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No.

In the Supreme Court of the United States

DALE L. SMITH,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

PETITION FOR A WRIT OF CERTIORARI

DANIEL R. ORTIZ
University of Virginia School of Law Supreme Court Litigation Clinic
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

ALLISON M. RITTER
Ritter, Rypel & Yasin LLP
2266 North Prospect Avenue
Suite 304
Milwaukee, WI 53202
(414) 274-0000

MARK T. STANCIL*
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

DAVID T. GOLDBERG
David T. Goldberg Law Office
99 Hudson Street, 8th Floor
New York, NY 10013
(212) 334-8813

**Counsel of Record*

QUESTION PRESENTED

Whether a criminal defendant's Sixth Amendment right to trial by an impartial jury was violated when a trial court, over the defendant's objection, allowed an employee of the prosecutor's office to serve as a juror.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The majority and dissenting opinions of the Supreme Court of Wisconsin, App., *infra*, 1a-39a, are reported at 716 N.W.2d 482. The January 11, 2005, decision of the Wisconsin State Court of Appeals, App., *infra*, 40a-46a, is unreported. The Milwaukee County Circuit Court's July 7, 2004, decision and order denying a motion for a new trial, App., *infra*, 47a-51a, is also unreported.

JURISDICTION

The judgment of the Supreme Court of Wisconsin was entered on June 27, 2006. On September 12, 2006, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including October 25, 2006. On October 12, 2006, Justice Stevens further extended the time within which to file a petition to and including November 24, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

STATEMENT

The sole issue presented is whether a criminal defendant's Sixth Amendment right to trial by an impartial jury, which the Fourteenth Amendment's Due Process Clause makes applicable to the States, *Duncan* v. *Louisiana*, 391 U.S. 145,

149 (1968), is violated when a trial court, over the defendant's objection, allows an employee of the prosecutor's office to serve as a juror. A closely divided Wisconsin Supreme Court held that an employee's subordinate relationship with the prosecuting office does not disqualify her from jury service in criminal cases brought by that office so long as the trial court accepts her assurances that she is capable of reaching an unbiased decision.

Petitioner Dale L. Smith was charged with operating a motor vehicle while intoxicated (second offense). During voir dire, one of the prospective jurors, Charlotte T., disclosed that she worked as an administrative assistant in the prosecuting district attorney's office. App., *infra*, 63a-64a. Smith's counsel moved to strike her for cause on the ground that "she works for the law firm prosecuting the case. Her employer is [Milwaukee County District Attorney] Michael McCann." *Id.* at 65a. The trial court denied Smith's motion. *Id.* at 66a.

Although Charlotte T. was a strong candidate for removal by peremptory challenge, Smith used his four allotted peremptory strikes to remove individuals whose voir dire responses raised even more serious concerns but whom the trial court also refused to strike for cause. More specifically, one of these four had said, "I have a friend who almost killed somebody while under the influence, and I've had several friends arrested for driving under the influence. I don't associate with them anymore. I've got children; I don't like that." App., *infra*, 61a. Another, a police officer, had to "arrest people for drunk driving" as "part of [her] job." *Id.* at 55a. A third prospective juror had answered that he "[would] have shot" an intoxicated driver he had once encountered if he had been armed at the time, *id.* at 54a, and, when pressed whether the fact that his brother "was put in a coma for two weeks because of a drunk driver," *id.* at 61a, would affect his ability to be fair, answered that it might, *ibid.*. That juror added that he "absolutely [could not be impartial] if [he]

found out [that] the person had denied the police the right to check his blood," *id.* at 67a. He explained: "[T]hat tells me he was drunk. I don't care, he should go to jail. That would totally blow me off right there." *Ibid.*[1] A fourth prospective juror had answered the defense question whether he could accord Smith the requisite presumption of innocence by saying "[p]erhaps," clarifying that "I kind of feel [he] would not be here unless [he had done] something wrong." *Id.* at 63a.

Although in one of these instances the state had *agreed* with the defense that there was "enough to strike [the juror] for cause," App., *infra*, 70a, the trial judge ruled that he would nonetheless seat that individual unless Smith used a peremptory, see *ibid.* With respect to these prospective jurors, the court accepted their answers that they "believe[d they were] neutral," *id.* at 67a, or that they "fe[lt they] c[ould] be impartial," *id.* at 63a. With Smith's peremptory challenges exhausted and his for-cause challenge to the prosecutor's employee overruled, Charlotte T. was seated on the jury that later convicted Smith of operating a motor vehicle while intoxicated. *Id.* at 73a.

Smith moved for a new trial on the ground that allowing an employee of the prosecutor's office to decide his guilt violated his Sixth Amendment right to an impartial jury. The trial court denied his motion, citing *State* v. *Louis*, 457 N.W.2d 484 (1990), in which the Wisconsin Supreme Court had held that a defendant's rights were not violated by empanelling jurors who were members of the same police department as one of the State's witnesses. The trial court

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[1] After this juror left chambers, the judge said "[h]e told you [that] if there was a refusal [to be tested], [the defendant is] dead in the water." App., *infra*, 68a. Defense counsel then pointed out that the State would present evidence that after blowing into the testing device three times, Smith refused to take the test a fourth time. *Id.* at 68a-69a The judge nonetheless denied defense counsel's request to stike this juror for cause. *Id.* at 70a.

thus concluded that "the mere fact that a juror works for the prosecuting office, without more, does not in and of itself disqualify the juror from service." App., *infra*, 50a.

Smith then appealed to the Wisconsin Court of Appeals, which affirmed the denial of his motion for a new trial. Again invoking *Louis*, that court observed that "[t]here [was] no evidence that Charlotte had any contact with the prosecutor in this case or had any familiarity with the prosecution of this case" and agreed "with the trial court's conclusion that the 'mere fact that a juror works for the prosecuting office, without more, does not * * * disqualify [her] from service.'" App., *infra*, 46a.

After granting Smith's petition for discretionary review, the Wisconsin Supreme Court, over the dissent of the Chief Justice and two other Justices, upheld the trial court's decision. Rather than adopt a *per se* rule that employees of the prosecuting attorney's office should not serve as jurors in cases prosecuted by that office, the majority held that motions to remove such individuals for cause should be evaluated under a "totality of the facts and circumstances" test. App., *infra*, 18a. It described that inquiry as focused

> upon whether the reasonable person in the individual prospective juror's position *could be* impartial. * * * [A] circuit court must consider the facts and circumstances surrounding the voir dire and the facts involved in the case. However, the emphasis of this assessment remains on the reasonable person in light of those facts and circumstances.

App., *infra*, 16a (emphasis added) (quoting *State* v. *Ferron*, 579 N.W.2d 654 (1998)). Since the trial court "is intimately familiar with the voir dire proceeding[] and is best situated to reflect upon the prospective juror's subjective state of mind," the majority explained, an appellate court must "give weight to the court's conclusion that a prospective juror is or is not

objectively biased [and] * * * reverse its conclusions only if as a matter of law a reasonable judge could not have reached such a conclusion." *Id.* at 17a-18a (quoting *State* v. *Lindell*, 629 N.W.2d 223 (2001)).

Applying this standard of review, the majority found "that a reasonable circuit court judge could conclude that Charlotte was not objectively biased under the totality of the facts and circumstances." App., *infra*, 18a. In reaching this result, the court thought it especially significant that Charlotte T. and the prosecuting attorney worked in different locations; that Charlotte T. did not work on investigations; and that the record did not show (1) that she recognized the prosecuting attorney or vice versa, (2) that they had had any contact, or (3) that Charlotte T. had any prior familiarity with the case or with any work in the other office location. *Ibid.* The majority separately noted that Charlotte T. had insisted that she could be fair and impartial, *id.* at 18a-19a, and that "the subjective state of mind of the juror is an important consideration in the overall determination" of bias, *id.* at 19a.

In reaching this result, the Wisconsin Supreme Court relied in large part on its prior decision in *Louis*. It stated:

> as we refused to exclude police officers from juries on a per se basis, so too do we refuse to exclude employees of the Milwaukee County District Attorney's Office on a per se basis. Without some other evidence that a prospective juror such as Charlotte cannot possibly be impartial, he or she should not be excluded solely on the basis of their employment.

App., *infra*, 24a. The majority maintained its decision was supported by several decisions of this Court: *Smith* v. *Phillips*, 455 U.S. 209 (1982), which held that the Constitution was not violated by seating a juror who had sought employment with but never been hired by the prosecutor's office; *Frazier* v. *United States*, 335 U.S. 497

(1948), in which employment with the Treasury Department was held not to preclude serving as a juror in a federal narcotics prosecution; and *United States* v. *Wood*, 299 U.S. 123 (1936), which upheld seating in a federal prosecution a juror who received a federal civil war pension and two other jurors who worked as clerks in the federal government. App., *infra*, 19a-20a. The majority also distinguished a recent decision of the United States Court of Appeals for the Seventh Circuit. *Id.* at 21a-22a. In that case, *United States* v. *Polichemi*, 201 F.3d 858, vacated in part on other grounds by 219 F.3d 698 (2000), the Seventh Circuit held that implied bias precluded a juror employed by the Civil Division of the U.S. Attorney's Office from sitting on a jury in a case tried by the Criminal Division. The Wisconsin Supreme Court majority reasoned that "[a]lthough there are factual similarities between *Polichemi* and this case, unlike [the juror in *Polichemi*], Charlotte did not work on any matters for the Milwaukee office, nor did she recognize the prosecutor. In other words, the relationship was * * * more remote in this case than in *Polichemi*." App., *infra*, 22a.

Chief Justice Abrahamson, joined by Justices Prosser and Butler, dissented. She would have held that "[w]hen a prospective juror is 'employed by an attorney in the case to be tried, the situation is so fraught with the possibility of bias that we must find bias regardless of the surrounding facts and circumstances and the particular juror's assurances of impartiality.'" App., *infra*, 29a (quoting *State* v. *Faucher*, 596 N.W.2d 770 (1999)). Although acknowledging that Charlotte T. was "not closely related to the assistant district attorney prosecuting the case," *id.* at 30a, she maintained that this fact did not

> diminish[] the challenged prospective juror's perception of the risk of an adverse employment action. Certainly, a reasonable person under the circumstances might perceive the possibility of the employer being unhappy with his or her vote as a juror. An objectively reasonable person

might (intentionally or unintentionally, consciously or subconsciously) give the edge to the employer in light of ties of economic interests and loyalty.

The risk of an employee sensing economic pressure to side with his or her employer is too great to rely on the prospective juror's representations of his or her ability to be unbiased. In addition, an employee may feel loyalty toward his or her employer and the positions the employer takes. An employee may reasonably wish to be a "team player" or may perceive peer pressure from coworkers to side with their employer.

Id. at 31a-32a (footnotes omitted).

Chief Justice Abrahamson also challenged the majority's effort to distinguish *Polichemi* on its facts, noting that the U.S. Attorney's office at issue in *Polichemi* was larger and more diffuse than the Milwaukee District Attorney's Office and that nothing in the Seventh Circuit's opinion had suggested "that the juror in that case was any closer to the prosecuting Assistant U.S. Attorney than [Charlotte T.] was to the prosecuting assistant district attorney" in the present case. App., *infra*, 35a-36a. The dissenting justices emphasized the limited reach of the bright-line rule they would apply. It would not "exclud[e] all government employees from serving on a jury in every case involving the government." *Id.* at 37a. It would, in fact, allow employees of prosecutors' offices to serve on civil or even criminal juries so long as their employer was not involved in the case. *Ibid.* This petition followed.

REASONS FOR GRANTING THE PETITION

I. The Wisconsin Supreme Court's Narrow Construction Of The Sixth Amendment Squarely Conflicts With Decisions Of Numerous Other State And Federal Courts

The Wisconsin Supreme Court deepened an already sharp conflict among state and federal appellate courts as to whether a court may, consistent with the Sixth Amendment's guarantee of "trial by an impartial jury," overrule a defendant's request that an employee of the prosecuting attorney not sit in judgment. Although no opinion of this Court has spoken definitively on the matter, Justice O'Connor's concurrence in *Smith* v. *Phillips* identified the "extreme situation" presented here—when a "juror is an actual employee of the prosecuting agency"—as a paradigmatic example of when the Constitution would not "allow a [guilty] verdict to stand," regardless of whether the individual was actually biased. 455 U.S. 209, 222 (1982) (O'Connor, J., concurring). Although courts (and legislatures) in many States have adopted the categorical approach Justice O'Connor suggested, others, like the Wisconsin Supreme Court, have held that the Constitution is not offended when an employee of the office prosecuting a criminal case is allowed to sit on the jury over the defendant's objection.

At least four States' highest courts—Indiana's, Georgia's, Hawaii's, and New York's—as well the federal court of appeals that includes the State in which this case arose, have held that the Sixth Amendment requires a trial court to excuse for cause a juror who is an employee of the prosecuting office. In addition, courts in numerous other jurisdictions have held that employees of the prosecutor's office are not permitted to serve on criminal juries brought by that office, but those courts have been less clear about the extent to which this rule rests on the Sixth Amendment itself (as opposed to

the common law principles on which the Amendment is based).

For example, as far back as 1885, Indiana found that an inherent conflict of interest arose when employees of the prosecutor's office were empanelled on juries in cases that that same office was prosecuting. The Supreme Court of Indiana explained:

> The prosecuting attorney stood * * * for and as the representative of the State, and was, by analogy and for all practical purposes, the plaintiff in the prosecution. [The juror] * * * had become and was the employee and subordinate of the prosecuting attorney * * *. He was, therefore, *impliedly* biased against the [defendant], and hence an improper juror.

Block v. *State*, 100 Ind. 357, 364 (1885). So great is this threat of bias, the Indiana Supreme Court later held, that a trial court may not seat a juror who "was married to a second cousin of a member of the prosecutor's staff," *Barnes* v. *State*, 330 N.E.2d 743, 746 (1975), or even one married to an attorney who had accepted a job offer in the prosecutor's office. *Haak* v. *State*, 417 N.E.2d 321 (1981). *Haak*, moreover, explicitly grounded this protection in the guarantees of the Sixth Amendment. *Id.* at 326.

In *Beam* v. *State*, 400 S.E.2d 327 (1980), the Georgia Supreme Court held that the trial court should have excused for cause a secretary in the appellate section of the district attorney's office prosecuting the criminal case. Relying on its prior Sixth Amendment precedent, the Supreme Court of Georgia held that

> [j]urors should be above suspicion. It is inherent in the nature of the duties of employees of district attorneys and the closeness with which such employees are identified with criminal procedures that questions regarding possible bias, fairness, prejudice or impermissible influence upon

> jury deliberations inevitably arise. These questions cannot be erased by a mere subjective, albeit sincere, declaration by the officer that he or she can be fair and impartial to a defendant.

Id. at 328 (quoting *Hutcheson* v. *State*, 268 S.E.2d 643, 644 (Ga. 1980)) (internal citations and brackets omitted). The juror's service, the court concluded, not only posed an intolerable risk of bias, but also created a "substantial appearance of impropriety." *Ibid.* Excusing the juror was thus necessary "to preserve public respect for the integrity for the judicial process." *Ibid.*

The Supreme Court of Hawaii has likewise held that "where a prospective juror is a prosecutor currently employed by the same office as the prosecutor trying the defendant, the court shall imply bias as a matter of law and dismiss the prospective juror for cause." *State* v. *Kauhi*, 948 P.2d 1036, 1041 (1997). Although the juror in that case was a prosecuting attorney, not just an employee of the prosecutor's office, the Hawaii Supreme Court treated that fact as merely "further complicat[ing]" the employer-employee relationship that was the heart of its constitutional concern. *Id.* at 1040. Relying on *Beam*'s Sixth Amendment holding and applying that case's "appearance of impropriety test," *id.* at 1039, the Hawaii Supreme Court "agree[d] that reasonable persons might question an employee's bias in favor of his or her employer, notwithstanding his or her outward declarations of impartiality," *id.* at 1040. It then noted that "[a]n employee may, even unconsciously, make decisions based upon loyalty to the employer or even perhaps out of fear of retribution." *Ibid.*

In *People* v. *Lynch*, 738 N.E.2d 1172 (2000), the New York Court of Appeals reached a similar result. Relying on Sixth Amendment precedent, *id.* at 1174 (citing *People* v. *Johnson*, 730 N.E.2d 932 (N.Y. 2000)), it held that "a student

intern employed at the prosecuting agency's office[] should have been dismissed for cause." *Ibid.* (citation omitted).

The Supreme Court of Kentucky has similarly held that a trial court should have dismissed a juror employed by the Commonwealth's Attorney's Office on the ground of implied bias. *Randolph* v. *Commonwealth*, 716 S.W.2d 253 (1986). It is "obvious," the court found,

> that an implied bias challenge lies against [the] juror * * * because her position as secretary for the Commonwealth's Attorney gives rise to a loyalty to her employer that would imply bias. In addition it is entirely possible that she may have been in a position to have known about the case prior to trial. It is the possibility of bias or prejudice that is determinative in a ruling on a challenge for cause.

Id. at 255-256.

The West Virginia Supreme Court has announced an even broader rule. Recognizing the need "to secure jurors who are not only free from prejudice but who are also free from the suspicion of prejudice," it has held that "when the defendant can demonstrate *even a tenuous* relationship between a prospective juror and *any* prosecutorial * * * arm of State government," that juror should be excused for cause. *State* v. *West*, 200 S.E.2d 859, 866 (1973) (emphasis added).

The Seventh Circuit, apparently the only federal court of appeals to examine the question directly, has agreed that jurors employed by the prosecuting attorney's office should be excused for cause under the Sixth Amendment. *United States* v. *Polichemi*, 219 F.3d 698 (2000). The juror in that case had worked for fifteen years as a secretary in the civil division of the U.S. Attorney's office prosecuting the case. 201 F.3d 858 (7th Cir.), vacated in part on other grounds by 219 F.3d 698 (7th Cir. 2000). The Seventh Circuit rejected the prosecution's contention that the case was controlled by decisions of this Court holding that the Sixth Amendment

does not exclude all government employees (or job applicants) from serving on juries. As the Seventh Circuit explained, the juror in *Smith* v. *Phillips*, the last of those cases, "was not an employee of the office; had no actual or perceived access to confidential information within the office; and had done little more than demonstrate an interest in the office. * * * A 15-year employee inside the prosecutor's office is in a materially different position." *Polichemi*, 219 F.3d at 705.

In contrast to these decisions, courts in several other states have embraced the approach adopted by the Wisconsin Supreme Court majority in the decision below. The Alabama Court of Criminal Appeals' opinion in *Lowe* v. *State*, 384 So. 2d 1164 (1980), is illustrative. In that case, the trial court denied a criminal defendant's challenge for cause of a juror employed by the district attorney. *Id.* at 1170-1171. Relying on this Court's Sixth Amendment holding in *United States* v. *Wood*, 299 U.S. 123 (1936), that employment by an agency of the federal government was not in itself grounds for excluding a juror from sitting in a federal criminal case, the Alabama court upheld the trial judge's refusal to dismiss the district attorney's employee. After quoting parts of two paragraphs from *Wood*, the Alabama court stated: "In the case at bar, there was no proof that the venire person would not render a fair, just, and impartial verdict. The fact that she was employed by the district attorney's office did not alone impute bias as a matter of law." *Lowe*, 384 So. 2d at 1171.

Other state courts have held that a juror's simple disclaimer of bias can overcome any presumption that his employment will affect his fitness to serve. In *State* v. *Scales*, 443 S.E.2d 124 (1994), for example, the North Carolina Court of Appeals interpreted that State's general disqualification provision, which North Carolina's Supreme Court had previously described as a "codification" of this Court's Sixth Amendment jurisprudence, *State* v. *Hightower*, 417 S.E.2d 237, 240 (1992), to allow a member of the district attorney's

staff to serve on a criminal jury, notwithstanding the defendant's objection because the "juror * * * stated that although it might be difficult, he thought he could follow the law." *Scales*, 443 S.E.2d at 127; accord *Roubideaux* v. *State*, 707 P.2d 35, 36 (Okla. Crim. App. 1985) (sustaining trial court's refusal to dismiss juror employed by district attorney because "she claimed during voir dire that she had not received any knowledge or opinion of the case as a result of her work"); *Eubanks* v. *State*, 635 S.W.2d 568, 572 (Tex. App. 1982) (upholding trial court's refusal to dismiss from the jury an assistant district attorney in the prosecutor's office because "[a]lthough he had been employed by the District Attorney's office for seven months, he testified that he had no personal knowledge of th[e] case[] and that he had no prior knowledge of this case * * * [and u]nder further questioning [he] stated that his association with the district attorney's office would have no bearing whatsoever on how he voted in the case").

One state appellate court has taken an intermediate position. In *Henry* v. *State*, 586 So. 2d 1335 (Fla. Dist. Ct. App. 1991), a criminal defendant sought dismissal for cause of a legal secretary employed by the state attorney. Relying in part on Sixth Amendment precedent, *id.* at 1337 (citing *Leon* v. *State*, 396 So. 2d 203 (Fla. Dist. Ct. App. 1981)), the Florida appellate court found no *per se* bar to jury service under these circumstances, but a very strong presumption against it:

> Although [the secretary's] employment at the state attorney's office does not provide an inherent reason to preclude her service on the jury, her employment presents a compelling inference that she would be partial to the state. Absent a strong showing to the contrary, the failure to exclude such juror for cause constitutes an abuse of discretion.

Ibid. In light of the juror's "equivocal and ambiguous responses" to the trial court's initial questions about her partiality, the appellate court held that even her "unequivocal" answers to the trial court's subsequent questions were insufficient to dispel a presumption of bias. *Ibid.*; cf. *id.* at 1338 (Cope, J., specially concurring) (arguing that court should have adopted a categorical bar, rather than a strong presumption).

While many States' rules concerning juror impartiality have been established in judicial decisions, other States have addressed the subject through legislation or court rule. But these measures themselves have been enacted and interpreted in the shadow of judicial decisions construing the Sixth Amendment. See, *e.g.*, *Ajabu* v. *State*, 693 N.E.2d 921, 938 (Ind. 1998) ("[W]e presume the General Assembly did not intend to legislate in conflict with the federal constitution."); *State* v. *Kennedy*, 357 S.E.2d 359, 363 (N.C. 1987) (finding that statute regulating for-cause challenges in criminal trials is "a codification of" a particular Supreme Court interpretation of the Sixth Amendment applied "generally to qualifying jurors in all cases"). Unsurprisingly, these statutes and rules (and the decisions interpreting them) replicate the sharp conflicts among judicial decisions interpreting the Sixth Amendment.

In particular, Alaska, Louisiana, and Colorado have each adopted rules that clearly foreclose jurors like Charlotte T. from serving in criminal cases brought by their employer. Alaska Rule of Criminal Procedure 24(c)(10) entitles defendants to have a prospective juror removed on the ground that he or she "is the * * * employee * * * of one of the attorneys," while another section of that rule authorizes challenges grounded on the prospective juror's employment "by an agency, department * * * or other unit of the State of Alaska, including a municipal corporation, which is directly involved in the case to be tried." *Id.* at 24(c)(14). Louisiana has a more focused exclusion, allowing the for-cause

challenge of a criminal juror whenever "[t]he relationship * * * by * * * employment * * * between the juror and * * * the district attorney * * * is such that it is reasonable to conclude that it would influence the juror in arriving at a verdict." La. Code Crim. Proc. Ann. art. 797(3) (1998); see *State* v. *Alexander*, 620 So. 2d 1166, 1167-1168 (La. 1993) (finding under the statute that an employee of Louisiana Attorney General's office was subject to for-cause challenge). The Colorado Supreme Court has interpreted that State's rule providing a right to remove for cause any "employee of a public law enforcement agency or public defender's office," Colo R. Crim Proc. 24(b)(1)(XII), very broadly: "To insure that a jury is impartial in both fact and appearance, a prospective juror who has even a tenuous relationship with any prosecutorial or law enforcement arm of the state should be excused from jury duty in a criminal case." *Ex rel. R.A.D.*, 586 P.2d 46, 47 (1978); see also Colo. Rev. Stat. § 16-10-103(k) (2003).

Oregon, Washington, and California have interpreted ambiguous statutory for-cause provisions to require the *per se* exclusion from criminal juries of employees of the prosecuting office. Although the Oregon Supreme Court declined to read section 136.220 of the Oregon Revised Statutes, which provides for disqualification of a juror who is "in the employment" of the criminal "[c]omplainant," Or. Rev. Stat. § 136.220(2)(c), (3)(2005), as requiring exclusion of all government employees (on the theory that criminal prosecutions are brought by the State), it held those provisions would require disqualification "of persons [employed by] * * * persons who verify or swear to an accusatory instrument, such as a prosecuting attorney." *State* v. *Rogers*, 836 P.2d 1308, 1318 (Or. 1992).

The Washington Court of Appeals similarly rejected a claim that a Washington law entitling defendants to remove potential jurors who stand "in the relation of * * * master and servant * * * to a party" or "in the employment for wage[s] of

a party," Wash. Rev. Code § 4.44.180 (2006); Wash. Super. Ct. Crim. R. 6.4(c)(2) (making section 4.44.180 of the Revised Code of Washington applicable to criminal juries), required exclusion of all state employees from juries in state criminal prosecutions. *State* v. *Johnson*, 712 P.2d 301, 304 (Wash. App. 1985). Nevertheless, the court made clear that individuals such as Charlotte T. fell squarely within the provision's bar:

> In modern times, it is unlikely that jurors would be influenced by their employment relationship with an arm of the state *that is not prosecuting the criminal action.* We believe that in order for a government employee to stand "in relation of . . . master and servant . . . to the adverse party" or to be an employee of "the adverse party" under RCW 4.44.180(2), there must be a substantial relationship between the interests the prospective juror has in his employment and the interest the government is advancing as a litigant.

Ibid. (emphasis added; citation omitted) (quoting text as it stood prior to a 2003 amendment that replaced "the adverse party" with "a party").

In light of the Sixth Amendment, the California courts have also interpreted an ambiguous state statute to require exclusion from criminal juries of employees of the office prosecuting the case. Immediately after quoting the relevant Sixth Amendment discussion in *Block* and in Justice O'Connor's concurrence in *Phillips*, a California court of appeals interpreted a statute "preclud[ing] jury service by one who has 'stood . . . in the relation of attorney and client . . . with the attorney for either party,'" to reach employees of the district attorney's office prosecuting the case. *People* v. *Terry*, 35 Cal. Rptr. 2d 729, 731 (1995). It wrote:

> [T]he thrust and purpose of [the statute,] if not perhaps its specific wording, requires that an attorney who is a

> member of the firm of counsel trying a case should not be permitted, over objection, to serve on the jury. This rule should apply as much to members of the district attorney's office as to any other firm of lawyers.

Id. at 732.

Other states, by contrast, have failed to include employees of the prosecuting office among those categories of people who are *per se* excluded by statute or court rule from jury service where their employer is the attorney prosecuting the case. North Dakota, for example, specifically enumerates through statute the permissible grounds for challenges for implied bias and expressly prohibits challenges for implied bias on any other grounds. N.D. Cent. Code § 29-17-36 (2006) (stating that "[a] challenge for implied bias of a juror may be taken for all or any of the following causes and for no other"). Because this statute fails to mention employment by the prosecutor among its listed "causes," a criminal defendant in North Dakota could successfully challenge an employee of the prosecuting office only by passing the high hurdle of actual bias.

The lower state and federal courts are deeply divided over what the Sixth Amendment's central guarantee of trial by an impartial jury requires. In many jurisdictions, employees of the prosecuting office can, over the defendant's objection, help decide the defendant's guilt or innocence. In others, they cannot. Only this Court can resolve the conflict.

II. The Wisconsin Supreme Court's Decision Permitting An Employee Of The Prosecuting Office To Sit On A Criminal Jury Is Inconsistent With The Sixth Amendment And The Common Law Principles On Which It Rests

Although the conflict among the lower courts provides sufficient reason to grant certiorari, this Court's review is further warranted because the Wisconsin Supreme Court's

construction of the Sixth Amendment stands deeply at odds with the principles that the Amendment reflects and with the concerns of fundamental fairness that led this Court to "incorporate" it though the Fourteenth Amendment.

The Framers of the Bill of Rights attached great importance to jury impartiality and to the right to challenge jurors, which is necessary to protect it. Thomas Jefferson, in his first inaugural address, deemed "trial by juries impartially selected" to be one of "the essential principles of our Government." Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), *in* Stephen Howard Browne, Jefferson's Call for Nationhood: The First Inaugural Address xv-xvi (2003). Likewise, his fellow Virginian Patrick Henry famously stated that the right of challenging jurors to ensure an impartial panel "is as valuable as the trial by jury itself." 3 Jonathan Elliot, The Debates in the Several State Conventions, on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787, at 542 (Washington, 1836) (Elliot, Debates).[2]

In addition, this Court has consistently held that the Sixth Amendment incorporates the common law's central protections, including those involving the right to trial by jury, juror fairness, and juror impartiality. See *United States* v. *Booker*, 543 U.S. 220, 244 (2005) (discussing "the interest in fairness and reliability protected by the right to a jury trial—a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment"); *Johnson* v. *Louisiana*, 406 U.S. 366, 370-371

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[2] Henry further noted that he "would rather the trial by jury were struck out all together" than lose the right to challenge jurors, Elliot, Debates, at 542, and George Mason, invoking a history of "the best men suffer[ing] by weak and partial juries," likewise emphasized his concern that the proposed Constitution did not explicitly permit the "right of challenging or excepting to the jury." *Id.* at 528.

(1972) (Powell, J., concurring) ("The reasoning that runs throughout this Court's Sixth Amendment precedents is that, in amending the Constitution to guarantee the right to jury trial, the Framers desired to preserve the jury safeguard as it was known to them at common law."); see also *Crawford* v. *Washington*, 541 U.S. 36, 68 (2004) (holding that with respect to the admission of testimonial evidence the Sixth Amendment Confrontation Clause "demands what the common law required * * *.").

At the time the Sixth Amendment was adopted, defendants were plainly entitled to have employees or servants of a party in the action removed from the jury. In *Commentaries on the Laws of England*, Blackstone wrote, "that [a juror] is the party's master, servant, counsellor, steward or attorney, or of the same society or corporation with him: all these are principal causes of challenge; which, if true, cannot be overruled." 3 William Blackstone, Commentaries *363.[3] Courts in the American colonies and nascent States followed Blackstone's standard well into the nineteenth century. Thus, Peter Oxenbridge Thacher, a Boston judge who wrote an 1834 treatise on "the Methods Known in the Law of Massachusetts, to Secure the Selection and Appointment of an Impartial Jury," adopted Blackstone's treatment of the issue nearly verbatim. Peter Oxenbridge Thacher, Observations on Some of the Methods Known in the Law of Massachusetts, to Secure the Selection and

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[3] A "principal challenge" in Blackstone's time is equivalent to a challenge for implied bias today, such as the one at issue in the instant case. In the Eighteenth Century, a juror subject to a principal challenge would be evaluated solely based on his relationship with a party to the case, regardless of any actual, subjective bias. As Blackstone wrote, "[a] *principal* challenge is such, where the cause assigned carries with it *prima facie* evident marks of suspicion, either of malice or favour." William Blackstone, 3 Commentaries *363. Such principal challenges, Blackstone explained, "cannot be overruled, for jurors must be *omni exceptione majores*." *Ibid.*

Appointment of an Impartial Jury, in Cases Civil and Criminal 14-15 (Boston, Russell, Odiorne & Co. 1834).

Other Eighteenth-Century commentators agreed with Blackstone that "servants" of a party were excludable on a principal challenge. One commentator, writing in 1752, noted that "[i]f a Juror be of Counsel, Servant, or of the Robes or Fee of either Party, it is a principal Challenge." The Complete Juryman: or, a Compendium of the Laws Relating to Jurors 122 (London, Henry Lintot 1752). The commentator further noted that "[i]f a Body politic or corporate, sole or aggregate brings an Action that concerns their Body politic or Corporation, and a Juror is [a relative of] any that is of that Body, it is a good principal Challenge." *Id.* at 116.

Charlotte T.'s jury service in this case poses no less a risk of bias than did the jury service of those addressed by Blackstone and his contemporaries. A juror employed by the agency prosecuting a particular criminal case should be subject to the same challenges for cause as one whose employer is a party in a civil case (or a defendant in a criminal case). The rationales for permitting such a challenge are identical: the juror/employee may consciously or unconsciously decide to rule in favor of her employer to avoid being subjected to retaliation at work. Even if the juror feels confident that her employer would not take formal adverse actions in the event of a disappointing verdict, she may still seek to avoid the awkwardness or tension that might arise in her relationships with co-workers if the jury on which she sat were to rule against (or fail to rule in favor of) her employer.

No less risk of bias exists with jurors, such as Charlotte T., who are employees of the prosecuting agency. Although the motto inscribed in the Attorney General's rotunda in the United States Department of Justice states that "the [government] wins its [case] whenever justice is done," Seth P. Waxman, *"Presenting the Case of the United States as It*

Should Be": The Solicitor General in Historical Context, n.113, at http://www.usdoj.gov/osg/aboutosg/sgarticle.html (June 1, 1998), the enterprise of prosecuting crime is "often competitive," *Johnson* v. *United States*, 333 U.S. 10, 14 (1948), and the same pressures and concerns that might infect a private employee/juror's deliberations might well infect—either consciously or unconsciously—those of a juror employed in a subordinate role in the prosecuting office. That the common law would exclude for reasons of implied bias a juror who "has acted as godfather to a child of the prosecutor," 1 Joseph Chitty, A Practical Treatise on the Criminal Law 541 (London, A.J. Valpy 1816), but not one who is employed under the prosecutor himself, beggars belief. While modern-day prosecuting agencies did not exist in Blackstone's time, the rationale behind the rule that jurors are subject to a principal challenge if they are employed by a party to the case applies with full force to employees of prosecuting agencies today.

For decades, this Court has recognized that the Sixth Amendment's express guarantee of "a speedy and public trial, *by an impartial jury*" (emphasis added) overlaps with an "independent[] require[ment]," rooted in due process, of "impartiality [for] *any jury* empaneled to try a cause." *Morgan* v. *Illinois*, 504 U.S. 719, 726 (1992) (emphasis added) (citing *Irvin* v. *Dowd*, 366 U.S. 717, 721-22 (1961)); see also *Turner* v. *Louisiana*, 379 U.S. 466, 471-72 (1965); *In re Murchison*, 349 U.S. 133, 136 (1955). The protections of juror impartiality afforded by the Sixth Amendment must necessarily be at least as strong as the minimum protections afforded by due process.

Under the Fourteenth Amendment's "basic requirement of due process," a defendant is entitled to "[a] fair trial in a fair tribunal." *Murchison*, 349 U.S. at 136; see also *Bracy* v. *Gramley*, 520 U.S. 899, 904 (1997) ("[T]he floor established by the Due Process Clause clearly requires a 'fair trial in a fair tribunal.'") (quoting *Withrow* v. *Larkin*, 421 U.S. 35, 46

(1975)). Whether the facts of a case are found by a judge or by a jury, the Constitution mandates that the fact finder be impartial: All parties must know "that the judge who hears his case will apply the law to him in the same way he applies it to any other party." *Republican Party* v. *White*, 536 U.S. 765, 776 (2002). In the words of John Adams, found in the First Constitution of Massachusetts:

> It is essential to the preservation of the rights of every individual, his life, liberty, property and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.

Mass. Const. of 1780, pt. I, art. XXIX.

Ensuring this requisite level of impartiality requires that judicial proceedings remain free not only of *actual* bias, but also of "even the probability of unfairness." *Murchison*, 349 U.S. at 136. "Every procedure which would offer a possible temptation * * * to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927).

Accordingly, this Court has understood due process to require that not even the appearance of impropriety infect judicial proceedings—a principle embodied in the maxim that "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *Murchison*, 349 U.S. at 136. Judges may not, for example, have any pecuniary interest, no matter how small, in the outcome of a case—a rule which applies even when the interest is indirect, *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813 (1986) (holding that an insurer's due process rights were violated by a state supreme court justice's participation in an

action seeking punitive damages for an insurer's alleged bad-faith refusal to pay a valid claim, when that justice, at the time he cast the deciding vote and authored the court's opinion, had pending at least one very similar lawsuit against an insurer in another state court), or due to professional obligation, *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972) (holding that due process was violated where a mayor responsible for village finances presided over a trial for traffic offenses where a significant proportion of the village's revenues were derived from traffic fines).

The present case involves the very same problem. Having an employee of the prosecuting attorney's office on the jury effectively allows the prosecutor to participate in the judgment of his own case. A prosecutorial employee would likely have—and certainly would appear to have—personal interests, both pecuniary and intangible, in the case's outcome. She might fear that a judgment adverse to her employer (or even just admitting in voir dire that she could not be impartial) would jeopardize her present or future employment opportunities. Even if she claims—or sincerely believes herself—to be free of bias, the *temptation to* judge partially and the *appearance of* impropriety cast a shadow on the proceeding. Just as the Fourteenth Amendment's requirement of due process forbids a judge from presiding over a case in which she has an indirect interest, the Sixth Amendment requires at least as much from jurors.

The need for a bright-line rule is especially strong in these situations because of the practical limitations on appellate review to protect defendants' Sixth Amendment rights. Throughout the nation, appellate review of trial courts' resolution of for-cause challenges is so deferential that such decisions are all but unappealable. Whether the standard of review requires "abuse of discretion" or "manifest error," "[t]here is hardly any area of the law in which the trial judge is given more discretion than in ruling on challenges of jurors for cause." *Cook* v. *State*, 542 So. 2d 964, 969 (Fla. 1989).

These rules reflect the practical reality that trial courts must make multiple, sometimes scores of, jury-related decisions; that such decisions must be based on limited information (lest each challenge become a mini-trial); that trial judges, but not appellate courts, are able to observe venirepersons' demeanor; and that reversal of conviction is a costly remedy for a decision that, while erroneous, is sometimes unavoidable in the press of voir dire. In this case, for example, had the venireperson who had stated about a previous encounter with a drunk driver that "[a]t the time, if I had had a gun, I'd have shot him," App., *infra*, 54a, or the two venirepersons who had stated on the record that they would have had trouble being objective and applying the presumption of innocence, *id.* at 61a, 63a, 67a, actually been seated over defendant's objection, the deference given to trial court judges would have made appeal difficult.

A bright-line rule would not only increase confidence in judgments rendered by trial courts in criminal cases, but also ease the burden on trial courts. That a prospective juror is an employee of the prosecutor's office in a criminal case can never be *irrelevant* in determining potential bias. Yet, case-by-case determination in these situations would require trial judges to examine thoroughly the internal workings of the prosecutor's office, including how the actual chains of authority operate, the degree of cooperation or interaction between the venireperson's division and that of the individual actually prosecuting the case, what job and salary protections, if any, employees enjoy, and the more informal aspects of office culture and practice that might cause an employee to be biased. Fact-intensive, case-by-case determination requires a *more* rigorous inquiry into the *actual* biases of the potential juror. See *Henry* v. *State*, 586 So. 2d 1335, 1337 (Fla. Dist. Ct. App. 1991). An employee of the prosecutor's office would necessarily undergo more intense scrutiny than other venirepersons as to potential subtle or unconscious bias. Far better to have a simple rule, understandable by any judge,

attorney, or layperson: current employees of the prosecuting attorney, while entirely eligible to sit on civil juries—or even in criminal cases prosecuted by other agencies—cannot sit on juries in cases prosecuted by their own employer. The Framers and the common law recognized this wisdom and this Court's intervention is necessary to reestablish it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DANIEL R. ORTIZ
University of Virginia School of Law Supreme Court Litigation Clinic
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

ALLISON M. RITTER
Ritter, Rypel & Yasin Law Office LLP
2266 North Prospect Avenue, Suite 304
Milwaukee, WI 53202
(414) 274-0000

MARK T. STANCIL*
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

DAVID T. GOLDBERG
David T. Goldberg Law Office
99 Hudson Street, 8th Floor
New York, NY 10013
(212) 334-8813

**Counsel of Record*

NOVEMBER 2006

APPENDIX

APPENDIX A

2006 WI 74

SUPREME COURT OF WISCONSIN

CASE NO.:	2004AP2035–CR
COMPLETE TITLE:	State of Wisconsin, Plaintiff-Respondent, v. Dale L. Smith, Defendant-Appellant-Petitioner.
	REVIEW OF A DECISION OF THE COURT OF APPEALS Reported at: 279 Wis. 2d 519, 693 N.W.2d 148 (Ct. App. 2005-Unpublished)
OPINION FILED:	June 27, 2006
SUBMITTED ON BRIEFS:	
ORAL ARGUMENT:	December 6, 2005
SOURCE OF APPEAL:	
COURT:	Circuit
COUNTY:	Milwaukee
JUDGE:	Russell W. Stamper
JUSTICES:	
CONCURRED:	
DISSENTED:	ABRAHAMSON, C.J., dissents (opinion filed). PROSSER and BUTLER, JR., J.J., join in the dissent.
NOT PARTICIPATING:	

ATTORNEYS:

For the defendant-appellant-petitioner there were briefs by *Allison M. Ritter* and *Hartley Law Office*, Milwaukee, and oral argument by *Allison M. Ritter*.

For the plaintiff-respondent the cause was argued by *Juan B. Colas*, assistant attorney general, with whom on the brief was *Peggy A. Lautenschlager*, attorney general.

2006 WI 74

Notice
This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 2004AP2035–CR
(L.C. No. 2001CT8142)

STATE OF WISCONSIN : IN SUPREME COURT

State of Wisconsin,

Plaintiff-Respondent,

FILED
Jun 27, 2006

v.

Dale L. Smith,

Cornelia G. Clark
Clerk of Supreme Court

Defendant-Appellant-Petitioner.

REVIEW of a decision of the Court of Appeals. *Affirmed.*

¶1 JON P. WILCOX, J. The defendant, Dale L. Smith (Smith), seeks review of an unpublished decision of the

court of appeals,[4] which affirmed Smith's judgment of conviction for operating a motor vehicle while intoxicated, second offense, and an order of the Milwaukee County Circuit Court, Russell W. Stamper, Sr., Reserve Judge, denying his motion for postconviction relief.

¶2 Smith contends that at trial, he was denied his constitutional right to a fair and impartial jury when the circuit court, during voir dire, denied his motion to strike a juror for cause. Smith argues that an administrative assistant employed by the Milwaukee County District Attorney's Office was objectively biased because she worked for the same entity as the prosecuting attorney.

¶3 We hold that the circuit court reasonably concluded that Charlotte T. (Charlotte) was not objectively biased under the facts and circumstances, as a reasonable person in Charlotte's position could be impartial. Therefore, we conclude the circuit court did not erroneously exercise its discretion in denying Smith's motion to strike Charlotte for cause. Essentially, we decline to create a per se rule that excludes potential jurors for the sole reason that they are employed by the Milwaukee County District Attorney's Office. As such, the decision of the court of appeals is affirmed.

I

[4] *See State v. Smith*, No. 2004AP2035-CR, unpublished slip op., ¶6 (Wis. Ct. App. Jan. 11, 2005).

¶4 In the early morning hours of October 3, 2001, Smith was pulled over by City of Franklin Police Officer Rebecca Fletcher (Fletcher). Based on her observations at the scene, Fletcher requested that Smith take a Breathalyzer test in order to determine whether he had a prohibited alcohol concentration. According to the criminal complaint, Smith refused to submit to the test, and Fletcher arrested him. On October 16, 2001, a criminal complaint was filed against Smith for unlawfully operating a motor vehicle while under the influence of an intoxicant, contrary to Wis. Stat. §§ 346.63(1)(a) and 346.65(2) (1999-2000). This was Smith's second such offense.

¶5 A jury trial began on September 30, 2003. During voir dire, prospective juror Charlotte called to the court's attention that she worked for the Milwaukee County District Attorney's Office. Specifically, Charlotte worked as an administrative assistant at the Children's Court Center in Wauwatosa. She also stated that she did not work on investigations. When asked whether she would have a problem being an impartial juror, Charlotte said, "No."

¶6 Later in chambers, Smith's counsel, Patrick D. Wait (Wait), moved to strike Charlotte for cause. The discussion between the court, Wait, and Assistant District Attorney Tiffany Harris (Harris) proceeded as follows:

> MR. WAIT: All right. I'd ask Number 9. be stuck [sic] for cause, she works for the D.A.'s

office.

THE COURT: What's the cause?

MR. WAIT: She works for the law firm prosecuting this case. Her employer is Michael McCann.

THE COURT: Is there authority for that?

MR. WAIT: I think that is for cause.

THE COURT: Is it occupational exclusion? By virtue of [the] fact she works for the D.A.'s office is it impossible for her to be impartial?

MR. WAIT: I don't think I have to prove impartiality; I think there can be a finding her employer is prosecuting the case.

THE COURT: I understand your opinion, do you have authority for that belief?

MR. WAIT: No, I don't have any cases I can cite.

THE COURT: State.

MS. HARRIS: Judge, I really don't think—I don't know her. She doesn't work in this

> particular building; she's out at Children's Court. I don't think there is any authority for that.
>
> THE COURT: Request denied. That was Number 9.

¶7 Besides Charlotte, Smith raised challenges to two other potential jurors in voir dire. These challenges were denied by the circuit court. In his brief to this court, Smith further argues that two additional jurors were "very problematic from a defense perspective."

¶8 First, Juror No. 2 stated that she had a friend who almost killed somebody while driving under the influence, and she had several friends arrested for driving under the influence with whom she did not associate anymore. Attorney Wait then asked her the following:

> MR. WAIT: Does that make it more difficult for you to judge a case fairly?
>
> JUROR NO. 2: No, I don't think so.
>
> MR. WAIT: Do you think it's going to be difficult for you to be impartial here?
>
> JUROR NO. 2: Yes.

Later in chambers, the court posed the following questions to

Juror No. 2:

THE COURT: Can you be impartial with respect to this case?

JUROR NO. 2: I think so.

THE COURT: At this point, are you inclined to believe one side as opposed to the other side?

JUROR NO. 2: Not necessarily, no.

THE COURT: You are at point zero?

JUROR NO. 2: Yes.

THE COURT: You are fair and neutral as to each side?

JUROR NO. 2: Yes.

After this questioning, Wait did not continue with his argument that Juror No. 2 should be struck for cause. The court had previously noted that difficulty in remaining impartial is not sufficient to excuse a juror.

¶9 Next, Wait challenged Juror No. 6, who informed the court that he encountered a drunk driver while driving with his wife and children. When asked whether that experience would make it problematic for him to sit on a case

where the defendant is charged with drunk driving, Juror No. 6 stated, "I guess I'd have to hear more information. At the time, if I had had a gun, I'd have shot him." During later questioning, Juror No. 6 revealed that his brother was put into a two-week coma because of a drunk driver. Wait then asked him the following:

> MR. WAIT: Is that going to affect your ability to be impartial here?
>
> JUROR NO. 6: I hope not, but I'm not sure.
>
> MR. WAIT: You also said that when you saw someone suspected of drunk driving, if you had a gun you would have shot him.
>
> JUROR NO. 6: I got that angry with him because I was with my wife and kids. . . .
>
> MR. WAIT: Do you feel you can be fair here today?
>
> JUROR NO. 6: I can try.

Later in chambers, the following discussion occurred:

> THE COURT: The real question is, can you be impartial, fair, and neutral in this case?
>
> JUROR NO. 6: I understand. I don't know, I

haven't heard the evidence yet. I would say absolutely not if I found out the person had denied the police the right to check his blood or check that if he was. To me that tells me he was drunk. I don't care, he should go to jail.

THE COURT: You don't know the answer to that question, right?

JUROR NO. 6: No.

THE COURT: Given that you don't know the answer as to what the evidence is going to say, I need you to tell us at this time, right now, are you at zero neutral, or are you leaning one way or the other?

JUROR NO. 6: I'm trying to stay at neutral.

THE COURT: Where are you?

JUROR NO. 6: I believe I am neutral.

THE COURT: You have the best opinion of where you are, and you believe you are neutral. That's your belief, right?

JUROR NO. 6: Yes.

Ultimately, the court concluded that Juror No. 6 said he could

be impartial, and it refused to strike him for cause.

¶10 In addition to these two jurors, Smith contends that Jurors Nos. 3 and 11 were problematic. Juror No. 3 was a police officer who had arrested people for operating while intoxicated. She said that she thought she could be impartial. Wait did not challenge Juror No. 3 for cause during voir dire.

¶11 Finally, in response to Wait's question of whether anyone on the jury had any feelings already developed about the defendant, Juror No. 11 stated, "I kind of feel you would not be here unless you were doing something wrong." Wait then asked, "[s]o in that regard, you've already formed an opinion?" Juror No. 11 responded with "[p]erhaps" followed by "Yes. I do feel I can be impartial." In chambers, Wait informed the court that "[r]egarding Number 11, I wrote 'he has formed an opinion as to this defendant that he's guilty.'" The court noted, however, that Juror No. 11 said he could be impartial. There was no further discussion about Juror No. 11.

¶12 Smith ultimately used his four peremptory challenges to strike Jurors Nos. 2, 3, 6, and 11. Charlotte was seated on the jury, and on October 1, 2003, Smith was unanimously convicted and sentenced to 90 days of jail.

¶13 After his conviction, Smith filed a postconviction motion for an order vacating the judgment and for a new trial based upon his being denied the right to an impartial jury as guaranteed by the Sixth Amendment of the United States

Constitution and Article I, Section 7 of the Wisconsin Constitution. The circuit court denied his motion, concluding that "the mere fact that a juror works for the prosecuting office, without more, does not in and of itself disqualify the juror from service.... Taking all [the] factors into consideration, the court cannot infer that a reasonable person in Juror T.'s position would be biased."

¶14 On appeal, the court of appeals primarily relied on two of our previous decisions: *State v. Faucher*, 227 Wis. 2d 700, 596 N.W.2d 770 (1999), and *State v. Louis*, 156 Wis. 2d 470, 457 N.W.2d 484 (1990), in reaching its decision. Based on *Faucher*, the court noted that only objective bias, not statutory or subjective bias, was at issue. The court also analogized the facts in this case to *Louis* in that the prospective juror and the prosecutor did not know each other. *See Smith*, No. 2004AP2035-CR, ¶6 ("The facts of record here suggest that this case is akin to *Louis*. Charlotte, although employed by the Milwaukee County District Attorney's Office, did not know the prosecutor in this case and the prosecutor did not know Charlotte."). The court of appeals agreed with the circuit court that "'the mere fact that a juror works for the prosecuting office, without more, does not in and of itself disqualify the juror from service.'" *Id.* The judgment and order of the circuit court were therefore affirmed.

¶15 Smith then filed a petition for review in this court, and we granted review.

II

¶16 The sole question we must address on appeal is whether Smith was denied the right to an impartial jury by the circuit court's refusal to strike Charlotte for cause. Smith argues that Charlotte should have been disqualified as objectively biased because she was employed by the prosecuting attorney. Essentially, Smith seeks a per se rule in Wisconsin that employees of the Milwaukee County District Attorney's Office cannot serve on juries in criminal cases prosecuted by their employer. Alternatively, the State argues that Charlotte did not demonstrate objective bias, and this court should not create a per se disqualification for such employees.

¶17 We believe in this case, the circuit court reasonably concluded that Charlotte was not objectively biased under the totality of the circumstances. We further refuse to create a per se exclusion of potential jurors that are employed by the Milwaukee County District Attorney. In our view, the exclusion of jurors on the basis of objective bias is best left to the case-by-case discretion of the circuit court.

¶18 "[A] criminal defendant's right to receive a fair trial by a panel of impartial jurors is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Art. I, § 7 of the Wisconsin Constitution, as well as principles of due process."[5] *Faucher*, 227 Wis. 2d at 715

[5] The Sixth Amendment to the United States Constitution provides in part: "In all criminal prosecutions, the accused shall enjoy the right to a

(citing *Louis*, 156 Wis. 2d at 478; *State v. Gesch*, 167 Wis. 2d 660, 666, 482 N.W.2d 99 (1992)). "To ensure an impartial jury, Wis. Stat. § 805.08(1) provides for juror disqualification if a prospective juror 'is not indifferent in the case.'" *State v. Mendoza*, 227 Wis. 2d 838, 847, 596 N.W.2d 736 (1999).[6]

¶19 "Prospective jurors are presumed impartial, and the challenger to that presumption bears the burden of proving bias." *Louis*, 156 Wis. 2d at 478. We have recognized three types of bias: (1) statutory bias; (2)

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speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed[.]" Article I, Section 7 of the Wisconsin Constitution provides in part: "In all criminal prosecutions the accused shall enjoy the right . . . in prosecutions by indictment, or information, to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed[.]"

[6] Wisconsin Stat. § 805.08(1) (2003-04) reads in full:

> The court shall examine on oath each person who is called as a juror to discover whether the juror is related by blood, marriage or adoption to any party or to any attorney appearing in the case, or has any financial interest in the case, or has expressed or formed any opinion, or is aware of any bias or prejudice in the case. If a juror is not indifferent in the case, the juror shall be excused. Any party objecting for cause to a juror may introduce evidence in support of the objection. This section shall not be construed as abridging in any manner the right of either party to supplement the court's examination of any person as to qualifications, but such examination shall not be repetitious or based upon hypothetical questions.

subjective bias; and (3) objective bias. *Faucher*, 227 Wis. 2d at 716.[7] Statutory bias is described by Wis. Stat. § 805.08(1) (2003-04) and concerns jurors who are "related by blood, marriage or adoption to any party or to any attorney appearing in the case, or has any financial interest in the case[.]" Charlotte does not fit within any of the categories constituting statutory bias.

¶20 Subjective bias "describe[s] bias that is revealed through the words and the demeanor of the prospective juror." *Faucher*, 227 Wis. 2d at 717. Stated another way, subjective bias "refers to the bias that is revealed by the prospective juror on voir dire: it refers to the prospective juror's state of mind." *Id.* Wisconsin Stat. § 805.01(1) (2003-04) also speaks to subjective bias, in that a juror who has "expressed or formed any opinion, or is aware of any bias or prejudice in the case[,]" shall be excused. Wis. Stat. § 805.08(1); *accord Faucher*, 227 Wis. 2d at 717. Smith does not maintain that Charlotte was subjectively biased, nor does the record

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[7] In *State v. Faucher*, 227 Wis. 2d 700, 716, 596 N.W.2d 770 (1999), we first adopted these three terms to describe juror bias. Previously, courts of this state used the terms implied bias, actual bias, and inferred bias. *Id.* at 716. Generally, the terms statutory bias and subjective bias closely correspond, respectively, to the terms implied bias and actual bias. *Id.* at 716 n.5. Furthermore, the term objective bias "in some ways contemplates both our use of the terms implied and inferred bias." *Id.* at 716. However, as we emphasized in *Faucher*, "the case law does not always use the former terms in a consistent manner, [and] there is not an absolute, direct correlation between the former terms and the terms we adopt today." *Id.* at 716-17.

demonstrate that Charlotte presented any subjective bias. During voir dire, Wait asked Charlotte the following question: "Even though you work in the district attorney's office and the district attorney's office is prosecuting this action, do you feel you can be totally impartial and fair about this case?" To this, Charlotte answered simply, "Yes."

¶21 In this case, we are concerned with objective bias.

> [T]he focus of the inquiry into "objective bias" is not upon the individual prospective juror's mind, but rather upon whether the reasonable person in the individual prospective juror's position could be impartial. When assessing whether a juror is objectively biased, a circuit court must consider the facts and circumstances surrounding the voir dire and the facts involved in the case. However, the emphasis of this assessment remains on the reasonable person in light of those facts and circumstances. . . . [W]hen a prospective juror is challenged on voir dire because there was some evidence demonstrating that the prospective juror had formed an opinion or prior knowledge, [] whether the juror should be removed for cause turns on whether a reasonable person in the prospective juror's position could set aside the opinion or prior knowledge. *[State v.] Ferron*, 219 Wis. 2d [481], 498, 579 N.W.2d 654 [(1998)].

Faucher, 227 Wis. 2d at 718-19.

¶22 The standard of review for whether a juror is objectively biased is a mixed question of fact and law. *Id.* at 720. "[A] circuit court's findings regarding the facts and circumstances surrounding voir dire and the case will be upheld unless they are clearly erroneous. Whether those facts fulfill the legal standard of objective bias is a question of law." *Id.*

> This court does not ordinarily defer to the circuit court's determination of a question of law. However, a circuit court's conclusion on objective bias is intertwined with factual findings supporting that conclusion. Therefore, it is appropriate that this court give weight to the circuit court's conclusion on that question.
>
> The circuit court is particularly well-positioned to make a determination of objective bias, and it has special competence in this area. It is intimately familiar with the voir dire proceeding, and is best situated to reflect upon the prospective juror's subjective state of mind which is relevant as well to the determination of objective bias. We therefore give weight to the court's conclusion that a prospective juror is or is not objectively biased. We will reverse

> its conclusion only if as a matter of law a reasonable judge could not have reached such a conclusion.

State v. Lindell, 2001 WI 108, ¶39, 245 Wis. 2d 689, 629 N.W.2d 223 (quoting *Faucher*, 227 Wis. 2d at 720-21).

¶23 Applying these standards, we hold that a reasonable circuit court judge could conclude that Charlotte was not objectively biased under the totality of the facts and circumstances. Therefore, the circuit court did not erroneously exercise its discretion in failing to strike Charlotte for cause.

¶24 In this case, the State of Wisconsin was represented by the Milwaukee County District Attorney's Office, located in the Courthouse Complex in downtown Milwaukee. Charlotte serves as an administrative assistant for the District Attorney's Office located in the Children's Court Center in Wauwatosa. She does not work on investigations. Furthermore, the record does not show any indication that Charlotte recognized Harris or vice versa. There is also no evidence that Charlotte had any contact with Harris, any prior familiarity with the case, or any work connected to the office in Milwaukee.

¶25 Additionally, both attorneys pressed Charlotte to consider whether her position as an administrative assistant for the District Attorney would influence her decision, and each time she responded unequivocally that she could be fair

and impartial. Although we recognize that "[i]t is not always enough that a prospective juror assures counsel or the court that he or she will be impartial[,]" *Lindell*, 245 Wis. 2d 689, ¶48, the subjective state of mind of the juror is an important consideration in the overall determination of objective bias. *Id.*, ¶39.

¶26 Smith relies on Justice O'Connor's concurrence in *Smith v. Phillips*, 455 U.S. 209, 221-22 (1982), for his position that Charlotte should have been dismissed as objectively biased because she was employed by the District Attorney's Office.

> While each case must turn on its own facts, there are some extreme situations that would justify a finding of implied bias. Some examples might include a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction.

Phillips, 455 U.S. at 222 (O'Connor, J., concurring). What Smith fails to discuss, however, is the controlling majority opinion of *Phillips*, and the United States Supreme Court's consistent position that government employees are not per se disqualified from serving as jurors in criminal cases. *See, e.g., Frazier v. United States*, 335 U.S. 497, 513 (1948) (concluding that a government employee, merely by virtue of

his government employment, was neither more nor less biased than a nongovernment employee); *United States v. Wood*, 299 U.S. 123, 149 (1936) ("We think that the imputation of bias simply by virtue of governmental employment, without regard to any actual partiality growing out of the nature and circumstances of particular cases, rests on an assumption without any rational foundation.").

¶27 In *Phillips*, the Court refused to make a per se exclusion on the ground of implied bias of a juror who had pursued employment with the district attorney prosecuting the case. *Phillips*, 455 U.S. at 221. After the defendant was convicted in state court, he sought federal habeas relief, and the district court imputed bias, arguing the average man in the juror's position would believe his decision as a jury member would affect his job application. *Id.* at 214. The Court reversed and held that there was no basis for this finding when the defendant failed to show the juror was actually biased. *Id.* at 215-18. In the words of the Court, "due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable." *Id.* at 217.

¶28 We fully recognize there may be situations where an employee of the Milwaukee County District Attorney will be objectively biased. Indeed, "'we caution and encourage the circuit courts to strike prospective jurors for cause when the circuit courts "reasonably suspect" that juror bias exists.'" *Lindell*, 245 Wis. 2d 689, ¶49 (quoting *Ferron*, 219 Wis. 2d at 495-96). However, permitting an administrative assistant to

serve on a jury who works at a different office in a different city than the prosecuting office and who otherwise knows nothing about the case, the defendant, and does not even recognize the prosecutor is not such an "extreme situation" that we must conclude the circuit court erred in refusing to strike Charlotte for cause.

¶29 Smith also contends that there is no meaningful distinction between this case and the Seventh Circuit decision of *United States v. Polichemi*, 219 F.3d 698 (7th Cir. 2000). In *Polichemi*, one of the jurors, Lorena Nape, was a 15-year employee of the United States Attorney's Office for the Northern District of Illinois, the prosecuting attorney in the case. *Id.* at 703. Nape worked as a secretary in the Civil Division, and there was evidence in the record that she sometimes worked on matters from the Criminal Division. *United States v. Polichemi*, 201 F.3d 858, 861-62 (7th Cir. 2000).[8] Furthermore, Nape admitted to recognizing the names of the prosecuting attorneys in the case, and being aware that they worked in her office. *Id.* at 862. She also stated that she could be fair and impartial. *Polichemi*, 219 F.3d at 703. The defendants moved to strike Nape for cause on the ground of implied bias, but the district court denied the motion. *Id.*

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[8] This earlier version of *United States v. Polichemi*, 201 F.3d 858 (7th Cir. 2000), was later partially vacated by the Seventh Circuit. *See United States v. Polichemi*, 219 F.3d 698, 702 (7th Cir. 2000). We cite to the earlier version solely for factual detail.

¶30 The Seventh Circuit reversed the defendants' convictions and held that although Nape may have been quite capable of maintaining her objectivity and "government employment alone is not, and should not be, enough to trigger the rule under which an employee is disqualified from serving as a juror in a case involving her employer," *id.* at 704, there are relationships that are "so close that the law errs on the side of caution." *Id.* The *Polichemi* court concluded that the relationship between Nape and the prosecuting attorney was just such a relationship.

¶31 Although there are factual similarities between *Polichemi* and this case, unlike Nape, Charlotte did not work on any matters for the Milwaukee office, nor did she recognize the prosecutor. In other words, the relationship was even more remote in this case than in *Polichemi.* Furthermore, *Polichemi* is, of course, not binding on this court. In Wisconsin, the court has generally been disinclined to create bright-line rules regarding juror exclusions. *See Louis*, 156 Wis. 2d at 479 (citations omitted) ("Both the United States Supreme Court and this court have been reluctant to exclude groups of persons from serving as petit jurors as a matter of law."). Instead, this court has preferred to leave the determination of bias in the able discretion of the circuit court. *See id.* (citing *Hammill v. State*, 89 Wis. 2d 404, 415, 278 N.W.2d 821 (1979)) ("[T]he circuit court has been given broad discretion to ensure that the jury as finally selected is impartial.").

¶32 Like the court of appeals, we believe *Louis* is

particularly persuasive. In *Louis*, the circuit court refused to strike for cause two police officers despite the fact that the State's chief witness worked in the same police department and the officers recognized the witness. *Id.* at 474. We held that the officers were not per se ineligible to serve on a jury and concluded that the circuit court properly exercised its discretion in determining that the two officers were not actually biased. *Id.*

¶33 We first noted that police officers were not among those groups the legislature had expressly excluded from service. *Id.* at 479-80. That is, law enforcement officers are not statutorily biased. *Faucher*, 227 Wis. 2d at 722. We also analyzed whether the officers demonstrated actual bias, or in today's terms, subjective bias. *Id.* at 723. Based on the questions posed to the officers at voir dire, the circuit court concluded that the officers could remain impartial and decide the case solely on the evidence presented. *Louis*, 156 Wis. 2d at 484. The record did not demonstrate otherwise; thus, the circuit court did not err in determining that the officers did not have actual bias. *Id.*

¶34 Finally, we observed that "[a] prospective juror's knowledge of or acquaintance with a participant in the trial, without more, is insufficient grounds for disqualification." *Id.* at 484 (citing *State v. Zurfluh*, 134 Wis. 2d 436, 438, 397 N.W.2d 154 (Ct. App. 1986)). In *Faucher*, we equated this language with our formulation of the objective bias standard and noted that the police officers were not objectively biased as "a reasonable person in the position of a law enforcement

officer could remain impartial despite working in the same department as a state witness." *Faucher*, 227 Wis. 2d at 722.

¶35 Ultimately, we concluded in *Louis* that a per se exclusion of police officers was not in accord with the great weight of state and federal authority. *See Louis*, 156 Wis. 2d at 480-83. Furthermore, we agreed with the following declaration of the Second Circuit Court of Appeals:

> "This court does not choose to create a set of unreasonably constricting presumptions that jurors be excused for cause due to certain occupational or other special relationships which might bear directly or indirectly on the circumstances of a given case, where, as here, there is no showing of actual bias or prejudice."

Id. at 483 (quoting *Mikus v. United States*, 433 F.2d 719, 724 (2d Cir. 1970)). Thus, as we refused to exclude police officers from juries on a per se basis, so too do we refuse to exclude employees of the Milwaukee County District Attorney's Office on a per se basis. Without some other evidence that a prospective juror such as Charlotte cannot possibly be impartial, he or she should not be excluded solely on the basis of their employment.[9]

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[9] We further believe that *State v. Louis*, 156 Wis. 2d 470, 457 N.W.2d 484 (1990), presents a stronger case of objective bias than this case does. Again, in *Louis* we allowed two police officers to sit on a jury even though the officers had to evaluate the credibility of another coemployee

¶36 One of the few cases in which this court has made a per se exclusion of potential jurors is *Gesch*, 167 Wis. 2d 660. As noted, in most cases we have refused to make a per se disqualification. *See, e.g., State v. Sarinske*, 91 Wis. 2d 14, 33, 280 N.W.2d 725 (1979):

> (The mere expression of a predetermined opinion as to guilt during the voir dire does not disqualify a juror per se. If the person can lay aside his or her opinion and render a verdict based on the evidence presented in court, then he or she can qualify as an impartial trier of fact.);

McGeever v. State, 239 Wis. 87, 96, 300 N.W. 485 (1941) (a prospective juror's past employment as a dance hall inspector, under the supervision of the local district attorney and sheriff, did not per se disqualify him from jury service).

¶37 In *Gesch*, we held that a prospective juror who is related to a state witness by blood or marriage to the third degree must be struck from the jury due to an implied bias.

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who was testifying as a witness. Here, Charlotte did not have to evaluate the credibility of Harris. Thus, in our view a work-related relationship between a juror and a witness is more indicative of objective bias than a work-related relationship between a juror and an attorney. If the connection in *Louis* was not enough for objective bias, we do not see how the connection in this case is enough for us to conclude Charlotte was objectively biased.

Gesch, 167 Wis. 2d at 662. We first noted that generally the circuit court's discretionary determination of a juror's subjective bias will suffice to protect the defendant's right to an impartial jury. *Id.* at 666. "However, there are situations in which the relationship between a prospective juror and a participant in the trial is so close that a finding of implied bias is mandated." *Id.* at 666-67.

¶38 We concluded that the circuit court conducted a thorough search for subjective bias and found no such bias. *Id.* at 667. Despite the lack of subjective bias, we held that the juror should still have been removed for cause:

> [W]here a prospective juror is related to a state witness by blood or marriage to the third degree, special problems exist that render a circuit court's search for actual bias an inadequate protection of a defendant's right to an impartial jury. One such problem is the potential for unconscious bias. It is virtually impossible for a prospective juror to consciously estimate how the family relationship with a witness will affect his or her judgment. Although no intentional actual bias may exist, the risk of unconscious bias in these situations is manifest.

Id. As such, we held that "[i]n circumstances, such as here, the mere probability of bias is so high that in order to assure a defendant the fundamental fairness to which the defendant is

entitled, we must imply bias and exclude the juror as a matter of law." *Id.* at 668.

¶39 Later, in *Faucher*, we described *Gesch* as follows:

> Our holding in *Gesch* is unique. In most circumstances . . . the conclusion that an individual is objectively biased requires some view of the facts and circumstances surrounding the voir dire and the case, as well as the prospective juror's answers. We therefore urge a circuit court to engage in a thorough voir dire when a party challenges a prospective juror through the class to which the prospective juror belongs. However, *Gesch* remains an example that some relationships are so fraught with the possibility of bias that we must find objective bias regardless of the surrounding facts and circumstances and the particular juror's assurances of impartiality.

Faucher, 227 Wis. 2d at 724.

¶40 Without more, we do not believe an employee of the Milwaukee County District Attorney's Office is an example of a relationship "so fraught with the possibility of bias" that we must per se exclude Charlotte. That Charlotte works as an administrative assistant in the Children's Court establishes little more than a distant acquaintance with the

prosecutor. Under the facts and circumstances of this case, we conclude that the circuit court reasonably concluded Charlotte was not objectively biased. As noted, *Gesch* is a unique holding, and we do not think that standing alone, an employee/employer relationship between a juror and the Milwaukee County District Attorney, like a close familial relationship, renders it utterly impossible for a potential juror to be impartial.

III

¶41 In sum, we hold that the circuit court reasonably concluded that Charlotte was not objectively biased under the facts and circumstances as a reasonable person in Charlotte's position could be impartial. Therefore, we conclude the circuit court did not erroneously exercise its discretion in denying Smith's motion to strike Charlotte for cause. Essentially, we decline to create a per se rule that excludes potential jurors for the sole reason that they are employed by the Milwaukee County District Attorney's Office. As such, the decision of the circuit court is affirmed.

By the Court.—The decision of the court of appeals is affirmed.

¶42 SHIRLEY S. ABRAHAMSON, C.J. (*dissenting*). This case raises the question whether a challenged prospective juror is objectively biased on the basis of her employment in the district attorney's office that is prosecuting the case.

¶43 The right to a trial by an impartial jury lies at the very heart of due process.[1] When a prospective juror is employed by an attorney in the case to be tried, the situation is "so fraught with the possibility of bias that we must find objective bias regardless of the surrounding facts and circumstances and the particular juror's assurances of impartiality."[2] The employee is, I conclude, objectively biased under the law and should, on objection, be struck for cause from the jury.

¶44 Accordingly, I conclude that the circuit court erroneously refused to strike for cause the challenged juror, an employee of the Milwaukee County District Attorney, in this criminal case prosecuted by the Milwaukee County District Attorney's office.

¶45 I agree with the defendant that the circuit court's failure to disqualify the challenged prospective juror for cause

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[1] *Irvin v. Dowd*, 366 U.S. 717, 721-22 (1961). A criminal defendant is guaranteed the right to a trial by an impartial jury by Article I, Section 7 of the Wisconsin Constitution.

[2] *State v. Faucher*, 227 Wis. 2d 700, 724, 596 N.W.2d 770 (1999) (discussing *State v. Gesch*, 167 Wis. 2d 660, 482 N.W.2d 99 (1992)).

is prejudicial error. The State agrees that if the circuit court erred, the error was prejudicial. I therefore dissent.

¶46 In determining whether a prospective juror manifests objective bias, the circuit court must determine "whether the reasonable person in the individual prospective juror's position could be impartial."[3] The primary concern in the objective bias analysis is whether the parties are provided with a fair trial.[4]

¶47 The majority opinion declines to find objective bias in the current case, reasoning that the relationship between the assistant district attorney prosecuting the case and the challenged prospective juror was "little more than a distant acquaintance."[5]

¶48 I agree that the challenged prospective juror is, in the instant case, not closely related to the assistant district attorney prosecuting the case. The challenged prospective juror worked in a different office, in a different community, and on different types of cases than the assistant district attorney prosecuting the case. Moreover, the assistant district attorney had no direct supervisory authority over the challenged juror.

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[3] *Faucher*, 227 Wis. 2d at 718.

[4] *Id.* at 715.

[5] *See* majority op., ¶40.

¶49 Nevertheless, the assistant district attorney and the challenged prospective juror do share the same ultimate superior, the Milwaukee County District Attorney. The Milwaukee County District Attorney is named as counsel along with the assistant district attorney on the court documents.

¶50 The distant degree of acquaintanceship relied upon by the majority opinion neither addresses nor diminishes the challenged prospective juror's perception of the risk of an adverse employment action. Certainly, a reasonable person under the circumstances might perceive the possibility of the employer being unhappy with his or her vote as a juror.[6] An objectively reasonable person might (intentionally or unintentionally, consciously or subconsciously) give the edge to the employer in light of ties of economic interests and loyalty.[7]

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[6] I recognize that the juror is likely protected from official adverse employment action by civil service rules and is protected from retaliatory action by statute. *See, e.g.*, Wis. Stat. § 103.87 (2003-04) (prohibiting disciplinary action when an employee testifies in a trial); Wis. Stat. § 230.90 (2003-04) (formerly § 895.65) (prohibiting retaliation by a government employer). An employee may nevertheless harbor a fear of adverse employment consequences if he or she decides a case against the employer's position.

[7] This court reached a similar conclusion regarding independent arbitrators in *Borst v. Allstate Ins. Co.*, 2006 WI 70, ¶4, __ Wis. 2d ___, ___ N.W.2d ___, in which we concluded that an arbitrator who has an ongoing employment relationship (as counsel) with one of the parties to an arbitration was "evidently partial" under Wis. Stat. § 788.10(1)(b).

¶51 The risk of an employee sensing economic pressure to side with his or her employer is too great to rely on the prospective juror's representations of his or her ability to be unbiased. In addition, an employee may feel loyalty toward his or her employer and the positions the employer takes. An employee may reasonably wish to be a "team player" or may perceive peer pressure from coworkers to side with their employer. In contrast, an employee might be biased against an employer.

¶52 While a prospective juror may be able to disclaim bias, it will too often be impossible for employees to completely eliminate the influence of an employer who, in essence, keeps a roof over their head and food on their table. These concerns are precisely why a case-by-case analysis of subjective and objective bias in this type of case is not satisfactory, and a bright-line rule is required.[8]

¶53 I conclude that an objectively reasonable person in the place of the challenged prospective juror would not ordinarily be able to separate his or her economic and loyalty interests from the determinations he or she would be required to make as juror. An employee of a district attorney's office

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[8] "It need not be assumed that any cessation of that employment would actually follow a verdict against the government. It is enough that it might possibly be the case; and the juror ought not to be permitted to occupy a position of that nature to the possible injury of a defendant on trial, even though he should swear he would not be influenced by his relations to one of the parties to the suit in giving a verdict." *Crawford v. United States*, 212 U.S. 183, 197 (1909).

should therefore be struck as a juror for cause when that office is prosecuting a case.

¶54 As Justice O'Connor recognized in her concurring opinion in *Smith v. Phillips*, 455 U.S. 209, 222-24 (1982), some situations (which she labeled as "extreme"), including employment with the prosecuting agency, would justify a bright-line rule excluding the prospective juror:

> While each case must turn on its own facts, there are some extreme situations that would justify a finding of implied bias . . . [including] a revelation that the juror is an actual employee of the prosecuting agency . . . . None of our previous cases preclude the use of the conclusive presumption of implied bias in appropriate circumstances.

¶55 My conclusion is consistent with the statutes and case law of other jurisdictions.

¶56 Many states have statutes requiring employees of counsel to be struck for cause when they are prospective jurors in a case in which their employer is involved.[9]

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[9] *See, e.g.*, Alaska R. Crim. Proc. 24(c)(10) (2006) (a juror is subject to challenge for cause if he or she is the "employee . . . of one of the attorneys"); MCR 2.511(D)(9) (2006) (Michigan, same); S.D. Codified Laws § 23A-20-13.1(4) (2006) (South Dakota, same).

Other state statutes create grounds for striking a potential juror for cause when the juror is an employee of a party. *See, e.g.*, Ark. Code

¶57 Similarly, in many jurisdictions, case law establishes a strong policy against allowing employees of law firms or prosecuting agencies to serve on a jury in which their employer is involved.

¶58 In *United States v. Polichemi*, 219 F.3d 698 (7th Cir. 2000), for example, the United States Court of Appeals for the Seventh Circuit held that a 15-year employee of the United States Attorney's Office for the Northern District of Illinois, which was conducting the prosecution, was impliedly biased and should have been excluded for cause.[10] The Seventh Circuit distinguished *United States v. Wood*, 299 U.S. 123 (1936), and *Dennis v. United States*, 339 U.S. 162 (1950). In both *Wood* and *Dennis*, the jurors were not employees of the office prosecuting the case, but rather employees of other offices of the United States government.[11]

Ann. § 16-33-304(b)(2)(B)(i) (2006) (providing grounds to strike for cause if the juror is employed by defendant or complainant); Idaho Code § 19-2020(2) (2006) (same); Iowa R. Crim. P. 2.18(5)e. (2005) (same); Kan. Stat. Ann. § 22-3410(2)(b) (2005) (same); Minn. R. Crim. P. 26.02(5)(1)6. (2006) (same); Ohio Crim. R. 24(C)(12) (2006) (same); Or. Rev. Stat. § 136.220(3) (2006) (same).

[10] *United States v. Polichemi*, 219 F.3d 698, 704 (7th Cir. 2000).

[11] *Id.*

The Seventh Circuit also distinguished *Smith v. Phillips*, 455 U.S. 209 (1982), because the challenged juror in that case was an applicant for a job with the office of the prosecuting attorney, not an employee. *Polichemi*, 219 F.3d at 704-05.

¶59 It is useful to compare *Polichemi* to the instant case. The U.S. Attorney's office for the Northern District of Illinois currently has over 300 employees, including 161 Assistant U.S. Attorneys, in two offices serving 18 counties.[12] It is unclear how many staff are employed by the Milwaukee County District Attorney, the prosecuting agency and employer of the challenged juror in the instant case, but there are approximately 125 assistant district attorneys.[13] There is nothing in the *Polichemi* opinion indicating that the juror in that case was any closer to the prosecuting Assistant U.S.

This court has rejected a bright-line rule of exclusion based on government employment. *State v. Louis*, 156 Wis. 2d 470, 482, 457 N.W.2d 484 (1990) (quoting *United States v. Wood*, 299 U.S. 123, 149 (1936)) ("'We think that the imputation of bias simply by virtue of governmental employment, without regard to any actual partiality growing out of the nature and circumstances of particular cases, rests on an assumption without any rational foundation.'").

In *McGeever v. State*, 239 Wis. 87, 96-97, 300 N.W. 485 (1941), the court held that there is no bright-line rule excluding *former* part-time employees of a district attorney's office from serving on a jury in a case prosecuted by the same district attorney's office. Because *McGeever* addressed past employment, it is inapplicable to the instant case.

[12] Website of the United States Attorney for the Northern District of Illinois, "About Us" page, http://www.usdoj.gov/usao/iln/aboutus/index.html (last visited June 21, 2006).

[13] Website of the Milwaukee County District Attorney, http://www.county.milwaukee.gov/display/router.asp?DocID=7715 (last visited June 21, 2006).

Attorney than the challenged juror in the instant case was to the prosecuting assistant district attorney.

¶60 *Polichemi* reflects and is consistent with the policies of over one hundred years of case law from various jurisdictions.[14]

¶61 Some state courts, like the majority opinion, have rejected a rule excluding prospective jurors based only on their employment relationship with counsel.[15] I disagree with the reasoning in these cases.

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[14] *See, e.g., People v. Terry*, 35 Cal. Rptr. 2d 729, 731 (Cal. Ct. App. 1994) (deputy district attorney should have been struck for cause "because this very case is being prosecuted by his boss"); *Beam v. State*, 400 S.E.2d 327, 328 (Ga. 1991) (secretary in appellate section of district attorney's office prosecuting trial should have been struck for cause based on perception of bias); *State v. Kauhi*, 948 P.2d 1036, 1041 (Haw. 1997) (court shall imply bias when prospective juror is deputy prosecuting attorney employed in same office as the prosecutor trying the case); *Block v. State*, 100 Ind. 357, 363 (Ind. 1885) (deputy prosecuting attorney impliedly biased because he was employee and subordinate of prosecuting attorney); *Randolph v. Commonwealth*, 716 S.W.2d 253, 255 (Ky. 1986) (secretary for prosecuting attorney impliedly biased as a matter of law and therefore must be struck for cause), overruled on other grounds by *Shannon v. Commonwealth*, 767 S.W.2d 548 (Ky. 1988).

[15] *See, e.g., Lowe v. State*, 384 So. 2d 1164, 1171 (Ala. Crim. App. 1980) (employment by the district attorney did not impute bias as a matter of law); *State v. Cox*, 837 S.W.2d 532, 535 (Mo. Ct. App. 1992) (child support enforcement investigator not automatically excluded as juror even though prosecutor was her superior); *Roubideaux v. State*, 707 P.2d 35, 36 (Okla. Crim. App. 1985) (administrative assistant in district attorney's office not automatically excluded as juror).

¶62 Because the challenged prospective juror has financial and loyalty ties to his or her employer, the juror cannot be expected to make an unbiased decision. A bright-line rule excluding an employee of a district attorney's office as a juror guarantees the criminal defendant his or her constitutional right to a fair and impartial jury and also protects prospective jurors from the unenviable position of deciding cases prosecuted by their employers.

¶63 The bright-line rule I propose is narrow. I do not propose a rule excluding all government employees from serving on a jury in every case involving the government.

¶64 Further, the rule I propose is not a categorical exclusion of all employees of a district attorney's office from serving on a jury. Employees of a district attorney's office may serve on civil juries if the district attorney's office is not involved as counsel in the case. Moreover, nothing in the rule I propose would prohibit an employee of a district attorney's office from serving on a jury in a criminal case prosecuted by a district attorney for another county.[16]

¶65 Although this court has been reluctant to do so, we have created bright-line rules to exclude prospective jurors when such rules were necessary. In *State v. Gesch*, 167 Wis. 2d 660, 482 N.W.2d 99 (1992), the court held that prospective

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[16] For example, had the challenged juror in the instant case lived in Waukesha, my proposed rule would not have prohibited her from serving on a criminal jury in a case prosecuted by the Waukesha County District Attorney.

jurors related to a state witness by blood or marriage up to the third degree of consanguinity are "impliedly" biased and must be struck for cause.[17] Discussing *Gesch* in a later case, the court observed that "*Gesch* is unique. In most circumstances . . . the conclusion that an individual is objectively biased requires some view of the facts and circumstances surrounding the *voir dire* and the case, as well as the prospective juror's answers . . . . However, *Gesch* remains an example that some relationships are so fraught with the possibility of bias that we must find objective bias regardless of the surrounding facts and circumstances and the particular juror's assurances of impartiality."[18]

¶66 This rationale applies just as forcefully, if not more so, to employees of the prosecutor's office as it does to family members.

¶67 For the reasons stated, I conclude that, because the challenged prospective juror was an employee of the Milwaukee County District Attorney's office that was prosecuting the case, she was objectively biased and should have been struck for cause.

¶68 The error was prejudicial. I would reverse the defendant's conviction and remand the matter to the circuit

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[17] *State v. Gesch*, 167 Wis. 2d 660, 662, 482 N.W.2d 99 (1992). The court now says that such prospective jurors are "objectively biased."

[18] *Faucher*, 227 Wis. 2d at 724 (discussing *State v. Gesch*, 167 Wis. 2d 660, 482 N.W.2d 99 (1992)).

court for a new trial.

¶69 I am authorized to state that Justices DAVID T. PROSSER and LOUIS B. BUTLER, JR. join this opinion.

No. 04-2035-CR

APPENDIX B

COURT OF APPEALS DECISION DATE AND FILED

January 11, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 04-2035-CR Cir. Ct. No. 01CT008142

STATE OF WISCONSIN **IN COURT OF APPEALS DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DALE L. SMITH,

DEFENDANT-APPELLANT.

No. 04-2035-CR

APPEAL from a judgment and an order of the circuit court for Milwaukee County: RUSSELL W. STAMPLER, Reserve Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.[1] Dale L. Smith appeals from a judgment entered after a jury found him guilty of operating a motor vehicle while intoxicated, second offense. He also appeals from an order denying his postconviction motion. Smith contends that the trial court erred in refusing to strike for cause a juror, Charlotte T., who works as an administrative assistant at the Children's Court Center. Smith argues that Charlotte was objectively biased because she is employed by the same entity as the prosecuting attorney. Because the trial court did not err in determining that Charlotte was not objectively biased, this court affirms.

BACKGROUND

¶2 During the *voir dire* of Smith's case, it was discovered that Charlotte worked at the Children's Court Center in Wauwatosa. The following exchanges occurred:

> [PROSECUTOR]: Okay. Juror No. 9., who do you know in the D.A.'s office?
>
> [JUROR NO. 9]: I work in the D.A.'s office?
>
> [PROSECUTOR]: You do? You know plenty of people who work in the D.A.'s office?

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2001-02).

[JUROR NO. 9]: Yes, I do.

[PROSECUTOR]: Because our office is prosecuting this case, do you think you'd have a problem being an impartial juror on this case?

[JUROR NO. 9]: No.

Defense counsel then examined Charlotte:

[COUNSEL]: Okay, and Miss T[.] you work for the D.A.'s office?

[JUROR NO. 9]: Yes.

[COUNSEL]: You are around the courthouse a lot?

[JUROR NO. 9]: I work at the Children's Court Center.

[COUNSEL]: What is your capacity out there?

[JUROR NO. 9]: Administrative assistant.

[COUNSEL]: Do you work on investigations?

[JUROR NO. 9]: No.

[COUNSEL]: Even though you work in the district attorney's office and the district attorney's office is prosecuting this action, do you feel you can be totally impartial, or impartial and fair about this case?

[JUROR NO. 9]: Yes.

¶3 The trial court determined that Charlotte was not biased and would not be struck for cause. Smith used his four peremptory challenges to remove four other prospective jurors that concerned him. As a result, Charlotte was left on the jury and heard the drunk driving case against Smith. The jury ultimately returned a unanimous guilty verdict. Smith was sentenced to ninety days in the House of Correction. He filed a postconviction motion seeking a new trial on the grounds that he was denied his right to an impartial jury. The trial court denied the motion. Smith now appeals.

DISCUSSION

¶4 There are three categories of juror bias: statutory bias, subjective bias and objective bias. *State v. Fauchner*, 227 Wis. 2d 700, 596 N.W.2d 770 (1999). Here, it is

undisputed that there is no statutory exclusion for Charlotte based on her employment at the Children's Court Center. Likewise, her answers indicated that she would not have subjective bias against Smith. Both sides agree that this case is solely about objective bias and whether Charlotte should have been removed from the panel simply because she was employed by the same entity as the prosecuting attorney.

¶5 Relying on *State v. Louis,* 156 Wis. 2d 470, 457 N.W.2d 484 (1990), the trial court determined that objective bias did not apply here. In *Louis,* our supreme court held that two members of the Milwaukee Police Department were not objectively biased merely because they were employed as law enforcement officers and worked in the same department with the state's witness. *Id.* at 474. "A prospective juror's knowledge of or acquaintance with a participant in the trial, without more, is insufficient grounds for disqualification." *Id.* The supreme court reaffirmed this determination in *Faulkner,* 227 Wis. 2d at 722.

¶6 The facts of record here suggest that this case is akin to *Louis.* Charlotte, although employed by the Milwaukee County District Attorney's Office, did not know the prosecutor in this case and the prosecutor did not know Charlotte. Charlotte herself is not a prosecutor, but an administrative assistant. Her work does not involve investigations. She does not work at the District Attorney's Office located at the courthouse complex in downtown Milwaukee. Rather, she works in a separate facility—the Children's Court Center located in Wauwatosa. There is no evidence that Charlotte had any contact with the prosecutor in

this case or had any familiarity with the prosecution of this case. Under these circumstances, this court agrees with the trial court's conclusion that "the mere fact that a juror works for the prosecuting office, without more, does not in and of itself disqualify the juror from service."

¶7 Accordingly, Charlotte was not objectively biased. She was a fair and impartial juror and, therefore, the trial court did not err in denying Smith's postconviction motion alleging otherwise.

By the Court—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2001-02).

APPENDIX C

STATE OF WISCONSIN	CIRCUIT COURT Branch 13	MILWAUKEE COUNTY

STATE OF WISCONSIN

Plaintiff,

vs.

Case No. 01CT008142

DALE SMITH,

Defendant.

DECISION AND ORDER DENYING MOTION FOR NEW TRIAL

On July 2, 2004, the defendant by his attorney filed a motion for a new trial on grounds that he was denied his right to an impartial jury. On October 1, 2003, a jury convicted the defendant of operating while intoxicated (2nd). He was sentenced to ninety days in the House of Correction. During voir dire, Juror No. 9, Charlotte T., hereafter "Juror T.", stated that she works for the District Attorney's Office in the Children's Court Center as an administrative assistant. Defense counsel moved to strike Juror No. 9 for cause because she works for the prosecuting agency. (Tr. 9/30/03, pp. 36-37). The court denied the motion. Defense counsel used his four peremptory challenges to remove other jurors, and therefore, Juror No. 9 was one of the twelve jurors who rendered the guilty verdict against the defendant.

The defendant contends that he was denied his right to an impartial jury when the court denied his motion to strike Juror T. for cause. In *State v. Fauchner*, 227 Wis. 2d 700 (1999), the Supreme Court identified three categories of juror bias: (1) statutory bias, (2) subjective bias, and (3) objective bias. Statutory bias applies to those persons who are "related by 'blood or marriage to any party or to any attorney appearing in [the] case' and those who '[have] any financial interest in the case.'" *Id.* at 717; § 805.08(1), Stats. A person fitting one of these descriptions is deemed to be biased "regardless of his or her ability to be impartial." *Id.* Subjective bias is revealed by the words and the demeanor of the prospective juror and therefore turns on an individual's responses during voir dire and the court's assessment of the individual's honesty and credibility. *Id.* at 717-18. Finally, "the focus of the inquiry into 'objective bias' is not upon the individual prospective juror's state of mind, but rather upon whether the reasonable juror in the individual prospective juror's position could be impartial." *Id.* Objective bias does not exist in a vacuum. In assessing whether a prospective juror is objectively biased, "a circuit court must consider the facts and circumstances surrounding the voir dire and the facts involved in the case." *Id.* at 718.

In essence, the defendant contends that Juror T. was objectively biased because no person in her position could be impartial. There is no allegation that Juror T. falls within the scope of statutory bias under section 805.08(a), Stats., or that her comments or demeanor during voir dire revealed any subjective bias against the defendant. During voir dire, the prosecutor questioned Juror T. about her job in the District Attorney's Office:

MS. HARRIS: Okay. Juror No. 9., who do you know in the D.A.'s office?

JUROR NO. 9: I work in the D.A.'s office?

MS. HARRIS: You do? You know plenty of people who work in the D.A.'s office?

JUROR NO. 9: Yes, I do.

MS. HARRIS: Because our office is prosecuting this case, do you think you'd have a problem being an impartial juror on this case?

JUROR NO. 9: No.

(Tr. 9/30/03 at pp. 22-23). Defense counsel questioned Juror T. further about her employment in the District Attorney's Office.

MR. WAIT: Okay and Miss T[.] you work for the D.A.'s office?

JUROR NO. 9: Yes.

MR. WAIT: You are around the courthouse a lot?

JUROR NO. 9: I work at the Children's Court Center.

MR. WAIT: What is your capacity out there?

JUROR NO. 9: Administrative Assistant.

MR. WAIT: Do you work on investigations?

JUROR NO. 9: No.

> MR. WAIT: Even though you work in the district attorney's office and the district attorney's office is prosecuting this action, do you feel you can be totally impartial, or impartial and fair about this case?
>
> JUROR NO. 9: Yes.

(Id. at pp. 34-35).

"The focus of the inquiry into 'objective bias' is not upon the individual prospective juror's state of mind, but rather upon whether the reasonable person in the individual prospective juror's position could be impartial." *Fauchner* at 718. In *State v. Louis*, 156 Wis. 2d 470 (1990), the Supreme Court held that two members of the Milwaukee Police Department were not objectively biased merely because they were employed as law enforcement officers and worked in the same department with the State's witness. The court also wrote, "A prospective juror's knowledge of or acquaintance with a participant in the trial, without more, is insufficient grounds for disqualification." *Id.* at 484. In *Fauchner*, the Court reiterated its ruling in *Louis*, and further held that "[a] reasonable person in the position of a law enforcement officer could remain impartial despite working in the same department as a state witness." 227 Wis. 2d at 722.

Because there is no statutory exclusion in Wisconsin for employees of a prosecuting office to serve as jurors, the court finds *Louis* to be instructive. Thus, the mere fact that a juror works for the prosecuting office, without more, does not in and of itself disqualify the juror from service. Whether a reasonable person in the position of an employee for the prosecuting office can remain impartial, however, will depend

on the particular facts and circumstances of the case. *Fauchner* at 720. In this instance, Juror T. stated that she works as an administrative assistant. She stated that her work does not involve investigations. Although she works for the same prosecuting agency as the prosecutor, she stated that she works at the Children's Court Center, which is a separate facility located in Wauwatosa, and not in the District Attorney's Office located in the Courthouse Complex in downtown Milwaukee. There is no evidence that Juror T. ever had any contact with the prosecutor in her capacity as an employee for the District Attorney's Office or that she had any familiarity with the prosecution of this case. Moreover, Juror T. unequivocally stated that she could be fair. Taking all these factors into consideration, the court cannot infer that a reasonable person in Juror T.'s position would be biased. Consequently, the court finds no error in denying the motion to strike Juror T. for cause.

THEREFORE, IT IS HEREBY ORDERED that the defendant's motion for new trial is **DENIED.**

Dated this _____ day of July 2004 at Milwaukee, Wisconsin.

BY THE COURT:

_____

Russell W. Stamper, Sr. (reserve)
Circuit Court Judge

APPENDIX D

STATE OF WISCONSIN: CIRCUIT COURT: MILWAUKEE COUNTY
BRANCH 26

STATE OF WISCONSIN,
Plaintiff,
-VS- Case No. 01-CT-8142
DALE L. SMITH,
Defendant.

September 30, 2003 BEFORE THE HONORABLE RUSSELL STAMPER, RESERVE CIRCUIT COURT JUDGE,PRESIDING.

CHARGE: Operating While Intoxicated, 2nd

APPEARANCES:

TIFFANY HARRIS, ASSISTANT DISTRICT ATTORNEY, APPEARED ON BEHALF OF THE STATE.

PATRICK D. WAIT, Attorney at Law, appeared on behalf of Defendant.

DEFENDANT present in court.

* * * * *

MS. HARRIS: Thank you. Does anyone on the panel know anyone who works for the Milwaukee County District Attorney's Office? Juror No. 4., Miss Market.

JUROR NO. 4: I know David Moss.

MS. HARRIS: I work in the same office as Mr. Moss. Would that affect your ability to remain impartial on this case?

JUROR NO. 4.: No.

MS. HARRIS: Who else? Juror No. 17, who do you know in the D.A.'s office?

JUROR NO. 17.: E. Michael McCann.

MS. HARRIS: I work for Mr. McCann. Knowing that the State is prosecuting this case, do you think you would be able to sit as an impartial juror and hear this case?

JUROR NO. 17.: Yes.

MS. HARRIS: Okay. Juror No. 9., who do you know in the D.A.'s office?

JUROR NO. 9.: I work in the D.A.'s office?

MS. HARRIS: You do? You know plenty of people who work in the D.A.'s office?

JUROR NO. 9.: Yes, I do.

MS. HARRIS: Because our office is prosecuting this case, do you think you'd have a problem being an impartial juror on this case?

JUROR NO. 9.: No.

MS. HARRIS: Okay. Now, has anyone on the panel ever been a witness or a victim or a defendant in a drunk driving-type of case?

JUROR NO. 6.: One time, many years ago, I was going down the road with my wife and kids, and this drunk just started screeching his wheels, stopping, running back and forth. We called the police. I wasn't around by the time the police got there.

MS. HARRIS: Would having that experience as a victim in that type of case, or a witness, would there be a problem for you to sit on this jury, knowing that this defendant is charged with drunk driving?

JUROR NO. 6: I guess I'd have to hear more information. At the time, if I had had a gun, I'd have shot him.

MS. HARRIS: You obviously have strong feelings. You are indicating you have to hear the evidence and the testimony in this case and make a judgment based on that?

JUROR NO. 6.: Yes.

MS. HARRIS: Do you think you'd be able to do that and remain impartial, listen to the testimony and base your decision on that?

JUROR NO. 6.: I think so.

MS. HARRIS: Now, did anybody else have a hand up? Juror No. 3.

JUROR NO. 3.: I don't know, because I'm a police officer, if you consider me being a witness. I have arrested people for O.W.I.

MS. HARRIS: Okay, because that's part of your job, you arrest people for drunk driving, do you think you'd be able to sit as an impartial juror on this case?

JUROR NO. 3.: Yes.

MS. HARRIS: Juror No. 12.

JUROR NO. 12.: I got pulled over because they suspected me of drunk driving. I was just tired. They had me get out and walk the line. They made me blow. I blew a complete zero. I felt harassed by the whole thing. I think they wanted to harass me. It was for a good hour the process I had to go through to prove I wasn't drunk.

MS. HARRIS: You weren't charge with operating while intoxicated?

JUROR NO. 12.: No.

MS. HARRIS: Would having that experience, do you think you would have a problem sitting as an impartial juror in this case?

JUROR NO. 12.: Probably, but I could hear it.

MS. HARRIS: You could be impartial?

JUROR NO. 12.: Yes. I'm sorry, final answer.

MS. HARRIS: Final answer is that you could be impartial?

JUROR NO. 12.: Yes.

MS. HARRIS: Thank you. Juror No. 14.

JUROR NO 14.: I was a defendant 20-plus years ago.

MS. HARRIS: Do you feel that you were treated fairly by the legal system and the police and the whole process?

JUROR NO. 14.: Yes, they got me fair and square.

MS. HARRIS: Being a defendant in a case which is the same charge as this defendant's here, do you think you would be able to sit as an impartial juror in this case?

JUROR NO. 14.: Yes.

MS. HARRIS: Thank you. Is there anyone here on the panel, beside Juror No. 12., who just told us about the unpleasant experience with law enforcement, has anyone else here had a bad experience with a law enforcement agency where you think you were treated unfairly? Does anyone have a problem with law enforcement to the extent that they—it would be a problem for them to sit on this jury? No. Okay, has anyone on this panel seen a drunk person before? Yes. I guess I would ask Juror No. 1., how did you know that they were drunk?

JUROR NO. 1.: Just by their mannerisms. I was currently a cashier at a gas station, and you can tell by the way that they act.

MS. HARRIS: Do you think by physical appearance?

JUROR NO. 1.: Speech, and sometimes I smell their breath. The station was less than a block away from a bar, so, obviously, we had our share of drunks.

MS. HARRIS: Juror No. 15., how could you tell ~~when~~ somebody is drunk?

JUROR NO. 15.: Slurred speech, just the way they act.

MS. HARRIS: Okay, so can we agree the fact is when someone is drunk, you can pretty much easily recognize it?

JUROR NO. 15.: Yes.

MS. HARRIS: Can we also agree another way to tell if somebody is drunk, obviously, is if you have a blood/alcohol, breath, or urine test?

JUROR NO. 15.: Yes.

MS. HARRIS: Now, do you think that you would be able to tell if someone is drunk, even without having an actual chemical test based on the physical indicators we've talked about? There will be testimony here that we don't have an actual B.A.C. in this case. Knowing that, do you think you'd have a problem if all the other evidence came back--Would you be able to judge whether this defendant, in your opinion, was operating while intoxicated, without having a blood/alcohol content or a breath test? Would anyone have a problem doing that?

JUROR NO. 12.: Yes, I would.

MS. HARRIS: You would have a problem without an actual breath or blood test?

JUROR NO. 12.: Definitely. I want to now what he blew in order to judge him correctly.

MS. HARRIS: If you had other testimony, other physical indicators of him being drunk, would you be able, based on that alone, to find he was driving drunk?

JUROR NO. 12.: No.

MS. HARRIS: Anyone else on the panel feel that way?

JUROR NO. 17.: I'd need to hear all the evidence.

MS. HARRIS: Fine, that's what I need to hear.

THE COURT: Let me inform you folks, if you are stopped for suspected "operating under the influence," there's a request you submit to a breath, blood, or urine test; but you can refuse. You can say, "no." If you say, "no," that doesn't mean you are not under the influence; that simply means you said, "no." There may be evidence that you are, there may be other evidence that you are under the influence. But since you said, "no," you don't have a blood, breath, or urine test, but that person is still prosecutable. That person can still be prosecuted. He does not avoid prosecution simply because this person refused to take the test. Having said that, let's get back to the inquiry of Juror No. 12. Does that change your answer?

JUROR NO. 12: She asked would I have a problem.

THE COURT: We are saying that tests are absent, blood/alcohol test is absent.

JUROR NO. 12.: Did he refuse it?

THE COURT: That's a different question. I want you to understand, despite the absence of such a test, one can still be operating under the influence, one can still be charged and may be guilty or not guilty, but it is irrespective of the absence of that test.

JUROR NO. 12.: Okay.

THE COURT: You may continue.

MS. HARRIS: Thank you, Judge. Is there anyone here on this panel that thinks the State or the County of Milwaukee doesn't have a right to monitor and arrest people that they think might be operating while intoxicated? Everyone can agree we should be able to do that? Okay. Does everyone on the panel understand what the judge mentioned earlier, that State has the burden of proving every element of the crime charged. I must prove to you beyond a reasonable doubt. Does everyone understand that? Does everyone understand reasonable doubt is a doubt based on a reasonable consideration of the evidence presented during this trial? And that there's a difference between reasonable doubt and a doubt based on speculation of what might be? Does everyone understand you should not base your verdict on speculation or sympathy, but only on the evidence you hear during the trial?

THE COURT: Let's get on with it, please. I'll instruct them in the due course of time.

MS. HARRIS: Actually, I have only one other question. Does anyone on the panel have moral convictions in that they feel they could not sit in judgment of another person?

Thank you, that's all I have.

THE COURT: Mr. Wait.

MR. WAIT: I'll try to make it brief. I have had the benefit of the judge and assistant district attorney having asked quite a few questions, so I have a pretty good idea of who you are. I want to thank you for sitting here today. I will make it brief so we can get to lunch.

There are police officers that are going to be testifying today, and some of you are police officers; some of you are becoming police officers, some of you want to become police officers, or have family members who are police officers. Sometime we see officers in a blue suit take the stand and testify, and it seems very credible. Does anyone here feel that a police officer, just because they are testifying, that their testimony is automatically more reliable than anyone else that would testify, even slightly more; does anyone feel that way?

(No response.)

MR. WAIT: Does anyone have a philosophical or religious belief that would make it very difficult for them to judge Mr. Smith here today? Does anyone here have any feelings about drunk driving, which gets a lot of publicity in the press--Does anyone have such feelings that this is an

offense different from others, that you could sit on almost any trial, but there is something about drunk driving that just pushes me a little--a personal experience or a moral conviction? Yes, Juror No. 2.

JUROR NO. 2.: I have a friend who almost killed somebody while under the influence, and I've had several friends arrested for driving under the influence. I don't associate with them anymore. I've got children; I don't like that.

MR. WAIT: Does that make it more difficult for you to judge a case fairly?

JUROR NO. 2.: No, I don't think so.

MR. WAIT: Do you think it's going to be difficult for you to be impartial here?

JUROR NO. 2.: Yes.

MR. WAIT: Again, we appreciate everyone's honesty here. This is what this is all about. Is there anyone else that has feelings of this nature?

JUROR NO. 6.: My brother was put in a coma for two weeks because of a drunk driver.

MR. WAIT: Is that going to affect your ability to be impartial here?

JUROR NO. 6.: I hope not, but I'm not sure.

MR. WAIT: You also said that when you saw someone suspected of drunk driving, if you had a gun you would have shot him.

JUROR NO. 6.: I got that angry with him because I was with my wife and kids. The average person doesn't slam on the brakes, turn around and do a 360 and come back at you.

MR. WAIT: Do you feel you can be fair here today?

JUROR NO. 6.: I can try.

MR. WAIT: You can try, that's what we are asking of everyone, to exercise your best ability to be impartial, to listen to all of the evidence.

Does anyone here absolutely not drink and cannot tolerate people who drink? No one. Does anyone feel drinking is immoral or violates any religious philosophical tenet? Nobody. Is there anyone here who belongs to any groups like MADD or Business Against Drunk Drivers? Has anyone here campaigned for tougher drunk driving laws? Nobody. Does everyone here understand that it is illegal to operate a vehicle while under the influence of alcohol? Does everyone understand it is not illegal to drink and drive? Does everyone understand the distinction?

All right. Has anyone at this point, based on what you've heard so far, developed any opinions about my client yet? Are we all still at the point where we are supposed to start at, that he is presumed innocent as he sits here right now? Does anyone have a hard time with that? Does anyone think if he is innocent, why is he charged?

JUROR NO. 11.: I kind of feel you would not be here unless you were doing something wrong.

Mr. WAIT: So in that regard, you've already formed an opinion?

JUROR NO. 11. Perhaps.

MR. WAIT: You are Mr. Forkes?

JUROR NO. 11.: Yes. I do feel I can be impartial.

MR. WAIT: Okay, I guess that's what I was going to ask you. You've heard that the burden of proof is upon the State. Some people may feel that that is unfair, that it's my burden to prove all this by evidence beyond a reasonable doubt. Does anyone think that is too high a burden, too unfair a burden for the State. Would everyone agree, if they felt that it looked somewhat possible that this gentleman committed a crime, but you are still convinced that the State has not proven every element, even one element by evidence beyond a reasonable doubt, that you must acquit him, you must find him not guilty? Does anyone have a problem with that?

(No response.)

MR. WAIT: Okay, and Miss Thomas you work for the D.A.'s office?

JUROR NO. 9.: Yes.

MR. WAIT: You are around the courthouse a lot?

JUROR NO. 9.: I work at the Children's Court Center.

MR. WAIT: What is your capacity out there?

JUROR NO. 9.: Administrative assistant.

MR. WAIT: Do you work on investigations?

JUROR NO. 9.: No.

MR.WAIT: Even though you work in the district attorney's office and the district attorney's office is prosecuting this action, do you feel you can be totally impartial, or impartial and fair about this case?

JUROR NO. 9.: Yes.

THE COURT: That is Miss Thomas, Number 9.?

MR. WAIT: Yes. Thank you very much, that's all I have.

THE COURT: All right.

MR. WAIT: Your Honor, I have a motion.
(In chambers.)

THE COURT: We are again in chambers. Both counsel are present along with the clerk. Mr. Wait.

MR. WAIT: Okay, with respect to No. 6., Francis Irizarry, he said, "If I had a gun I would have shot the guy. I suspected the guy of drunk driving, who else would drive like that." It looks like he's pretty aggressive. He says he thinks he can be impartial, but a lot of his other words say otherwise.

THE COURT: Yes, you didn't ask him the bottom line question. He said he would try to be impartial. That's as far as we got. He would have to say he could not before I excuse him.

MR. WAIT: I think Number 2. said he couldn't be impartial. I asked him again and he said he could be impartial.

THE COURT: Quote, would it be difficult to be impartial? He said, yes, difficult, but not impossible. Again, this is a difficult process. Difficult is not sufficient to excuse a juror.

MR. WAIT: All right. I'd ask Number 9. be stuck for cause, she works for the D.A.'s office.

THE COURT: What's the cause?

MR. WAIT: She works for the law firm prosecuting this case. Her employer is Michael McCann.

THE COURT: Is there authority for that?

MR. WAIT: I think that is for cause.

THE COURT: Is it occupational exclusion? By virtue of fact she works for the D.A.'s office is it impossible for her to be impartial?

MR. WAIT: I don't think I have to prove impartiality; I think there can be a finding her employer is prosecuting this case.

THE COURT: I understand your opinion, do you have authority for that belief?

MR. WAIT: No, I don't have any cases I can cite.

THE COURT: State.

MS. HARRIS: Judge, I really don't think—I don't know her. She doesn't work in this particular building; she's out at Children's Court. I don't think there is any authority for that.

THE COURT: Request denied. That was Number 9.

MR. WAIT: That takes care of it for me.

THE COURT: State have any requests?

MS. HARRIS: Since we are in chambers here, there was an issue raised about the meaning of Juror No. 6.'s statement.

THE COURT: That he would "try" to be impartial, I'm willing to pursue that. Are you pressing forward with a request of execution for cause?

MR. WAIT: Yes.

THE COURT: Call Juror No. 6. into chambers, please.

(Juror No. 6. enters chambers.)

THE COURT: Have a seat, sir. You expressed some feelings about some of your experiences in life involving persons who apparently were under the influence of alcohol

or drugs. In response to one question, you indicated you would try to be impartial. We need to try to pin you down, if you would please allow us. The real question is, can you be impartial, fair, and neutral in this case?

JUROR NO. 6.: I understand. I don't know, I haven't heard the evidence yet. I would say absolutely not if I found out the person had denied the police the right to check his blood or check that if he was. To me that tells me he was drunk. I don't care, he should go to jail. That would totally blow me off right there.

THE COURT: You don't know the answer to that question, right?

JUROR NO. 6.: No.

THE COURT: Given that you don't know the answer as to what the evidence is going to say, I need you to tell us at this time, right now, are you at zero neutral, or are you leaning one way or the other?

JUROR NO. 6.: I'm trying to stay at neutral.

THE COURT: Where are you?

JUROR NO. 6. I believe I am neutral.

THE COURT: You have the best opinion of where you are, and you believe you are neutral. That's your belief, right?

JUROR NO. 6.: Yes.

THE COURT: All right, are there any questions?

MS. HARRIS: No.

MR. WAIT: No.

THE COURT: Okay, please return to your seat, sir.

(Juror No. 6. leaves chambers.)

THE COURT: He told you if there was a refusal, he's dead in the water.

MR. WAIT: They are going to testify after he blew the first time, they asked him to blow three more times. Then the testimony is, they will quote something like, "I'm not blowing that "F-ing" machine again.

THE COURT: He blew once, then not again.

MR. WAIT: Three times insufficiently.

THE COURT: After the fourth attempt, did he say—

MR. WAIT: Yes, "I'm not going to do this anymore."

THE COURT: He blew four times. All right, I don't know how you can characterize that.

MS. HARRIS: It's considered a refusal. I will mention that State's putting on evidence that he refused to provide a sufficient sample.

MR. WAIT: I think that forms an opinion.

THE COURT: What happened the first time, did he blow sufficiently?

MR. WAIT: That is correct.

MS. HARRIS: I think so.

THE COURT: You need two tests?

MS. HARRIS: We need three. They take an average.

THE COURT: He blew sufficiently one time, he failed to blow sufficiently three times, and then he said, "that's it."?

MR. WAIT: Right.

THE COURT: And arguably—

MR. WAIT: At this point what you are listening to is a man who already has a lot of strong pre-formed opinions. Added to that, as soon as he hears someone talking about a refusal, he says, "that's it."

THE COURT: He said, "if there was a refusal, then, that's it." Was there a refusal?

MR. WAIT: The fact is, he's saying he's not going to consider any other evidence.

THE COURT: If a condition is met.

MR. WAIT: What he is saying is, he will rule out any other evidence.

THE COURT: I know what he is saying. I think he is saying one thing and meaning another thing.

MR. WAIT: I think it is sufficient to strike him for cause.

THE COURT: Okay, you do. State.

MS. HARRIS: I think there is enough to strike him for cause at this point.

THE COURT: All right, Juror No. 6. said he would try to be impartial. Juror No. 2. said it would be difficult to be impartial. Yes, there's as far as we went. We can live with difficulty. I will.

MR. WAIT: I wrote "impartial," but yet I wrote a star and circled it, which usually is a bad indication. My recollection is he answered in such a way he may not be able to be impartial here.

THE COURT: Let's bring Juror No. 2. in.

(Juror No. 2. enters chambers.)

THE COURT: You are Juror No. 2., Charles Vine?

JUROR NO. 2.: Yes.

THE COURT: Mr. Vine, a question was put to you, "would it be difficult for you to be impartial," and the answer was, "yes." Okay, a different question, a similar question: Can you be impartial with respect to this case?

JUROR NO. 2.: I think so.

THE COURT: At this point, are you inclined to believe one side as opposed to the other side?

JUROR NO. 2.: Not necessarily, no.

THE COURT: You are at point zero?

JUROR NO. 2.: Yes.

THE COURT: You are fair and neutral as to each side?

JUROR NO. 2.: Yes.

THE COURT: Mr. Wait.

MR. WAIT: No questions.

THE COURT: State.

MS. HARRIS: No, thank you, sir.

THE COURT: Thank you, you may return to your seat.

MR. WAIT: Regarding Number 11., I wrote, "he has formed an opinion as to this defendant that he's guilty."

MS. HARRIS: No, I think he said he kind of feels that way. I got into it with him, and he said, "I can be impartial."

THE COURT: That's right. His last words were, he said he could be impartial. All right, so I am pondering on

Number 6. He said he believes he is neutral. We will stay with him.

Okay, there was one other point you raised, it had to do with—

MR. WAIT: Juror No. 16., you struck 16. for cause, questioned her in front of everybody then struck her. I just ask if anybody is struck for cause that it be done with our discussion.

THE COURT: Do you object to me dismissing her for cause?

MR. WAIT: She is dismissed, I don't think we can get her back. I renew my objection for the record.

THE COURT: What objection?

MR. WAIT: I object to her being struck for cause in open court.

THE COURT: Because you didn't make a satisfactory inquiry that she was unable to be neutral?

MR. WAIT: Yes.

THE COURT: She answered three time she couldn't be neutral. Okay. Juror 21. went to 4. Juror 23. went to 16.

(In open court.)

THE COURT: Now the attorneys are going to strike down to twelve of you. After that we will break for lunch, and we will come back and start the trial.

(Attorneys make their strikes.)

THE COURT: Ladies and gentlemen, the clerk will now read the names of the twelve of you selected to serve on this jury. If you are not selected, you should return to Jury Assembly for further instructions. We thank you for coming over and participating to the extent that you have. And the clerk will now call the names of the twelve.

THE CLERK: Brent Lowell, Doreen Zalenski, Charlotte Thomas, Peter Cunningham, Wayne Seidel, George Frey, Loretta Staszak, Julie Everett, Elouise Gage, Darlene Loche, and Ronald Agor.

I'm sorry, I missed one, that's Laura Marek. Mr. Agor, I apologize, you were not selected. Colleen Hershberger was selected, Colleen Hershberger.

THE COURT: All right, we've got twelve, and we will break for lunch. Folks, come back at 2:15.

(Jury leaves courtroom at 1:15 p.m.).

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